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5 In propria persona

6 **E-filing**

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NORTHERN DISTRICT OF CALIFORNIA

8 UNITED STATES DISTRICT COURT

9 IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 CV 08 1285CW

11 JASON PAUL VOELKER,

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Petitioner,

vs.

M. C. KRAMER, Warden, et al.,

Respondent.

CASE No.: _____

PETITION FOR A FEDERAL (PR)
WRIT OF HABEAS CORPUS
(28 U.S.C. Section 2254.)

PETITION FOR WRIT OF HABEAS CORPUS

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PREFACE

Commenting on the overwhelming flow of habeas corpus petitions that are filed within America's judicial system, a wise man once said: "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." (*Brown v. Allen*, 344 U.S. 44, 537 (1953) opn. Justice Jackson.) Indeed, Justice Jackson made a significant point—prophetic, if I may say so. Today, many habeas petitions simply contain a route of many roads leading from nowhere to nothing. Some Petitioners have forgotten that habeas is a remedy to right a wrong. It is not a lottery ticket or a device for investigating possible claims, but a means of vindicating actual claims. Inevitably, the sheer volumes of frivolous petitions have, in my humble opinion, necessarily precipitated a chilling effect on the ones that are potentially legitimate.

As a young child, I remember being told an old tale about a little boy who would often cry that he had seen a wolf. Each time this boy cried the local townsmen would run to his aid, only to find that the little boy was being deceitful—there was indeed no wolf to be found. Most of us remember how this story ended. Unfortunately, many prisoners must have forgotten this old fable. Their forgetfulness, however, not only dooms their claims, but it condemns the rest of us as well—leading to inconsistent rulings, needless re-litigation of the same issues, wasted court time, and most tragically, every now and again, meritorious claims are lost without ever being adjudicated at all.

So how, then, does a sincere petitioner, without the aid of an attorney, convince an already skeptical court that his "needle is worth the search?" I do not begin to know the answer to this question, but what I do know is that the few sincere should not be discouraged by the many who make this burden that much harder. I must not give up. I must lift my pen and passionately wield it. And then, God willing, I might catch the eye of a diligent jurist.

Old Folsom, California
February 27th, 2008

J.P.V.

In propria persona

JASON PAUL VOELKER,

VS.

Respondent.

CASE No.: _____

28 U.S.C. § 2254 PETITION

**(Evidentiary Hearing and Appointment
of Counsel Requested.)**

I, Jason Paul Voelker, petitioner in the above-entitled cause (hereinafter "petitioner"), appeal Honorable Court for a Writ of Habeas Corpus by a person in state custody pursuant to the States Constitution, 28 United States Code section 2254, and all other applicable federal law. Reasons for why this petition should be granted are set forth within.

I.

Petitioner Jason Paul Voelker is confined in violation of the Constitution by the Director of the California Department of Corrections & Rehabilitation and Mathew Kramer, Warden of Folsom State Prison (hereinafter "respondent"). This Petition arises from the judgment of conviction rendered December 22, 2004, in San Rafael, California, in People v. Jason Voelker, Marin County Superior Court Case No.: SC132406A.

II.

On February 26, 2004, petitioner was convicted in a jury trial of Penal Code § 211/213, subdivision (a)(1)(A), robbery in concert (count 1)¹, § 245, subdivision (a)(1), assault by means likely to cause great bodily injury (count 2) and § 236 false imprisonment (count 3). As to counts 1 and 2, pursuant to § 12022.7, subdivision (a), it was alleged that petitioner personally inflicted great bodily injury upon Damian DiPrima.

III.

On July 30, 2004, the section 12022.7 great bodily injury enhancements were dismissed pursuant to the prosecution's motion. (RT 1374.) However, finding that a mistake had been made, the trial court reinstated these enhancements and instead, struck the "on bail enhancement." (CT 482, 548; RT 1384-1389.) (Discussed post VIII.)

IV.

On December 22, 2004, probation was denied and petitioner was sentenced to the mid-term of 6 years on count 1. The sentences on counts 2 and 3 were stayed. A consecutive term of 3 years was imposed for the great bodily injury enhancement. Thus, petitioner's total sentence in the instant case was 9 years. A 2 year 8-month sentence in another case (case no. SC124701A) was ordered to run

¹ All further statutory references are to the California Penal Code unless otherwise indicated.

1 consecutive to the sentence in the instant case. (CT 550-552; RT 1408-1410.) The First District
2 Court of Appeal affirmed the judgment in a non-published opinion. (People v. Voelker 2005 WL
3 299581 (Nov. 9, 2005, A108798 [nonpub. opn].)) On January 18, 2006 the California Supreme
4 Court declined discretionary review.

5
6 V.

7 On April 4, 2006, petitioner filed a petition for a writ of habeas corpus in the Marin County
8 Superior Court. On August 4, 2006, the original trial judge without any in-court proceedings
9 summarily denied the petition.

10 VI.

11 On September 19, 2006, petitioner challenged the lower court's ruling in a petition for habeas
12 corpus relief to the California First District Court of Appeal. The appellate court denied the petition
13 on October 12, 2006. The California Supreme Court subsequently granted petitioner's petition for
14 review. On Review, the California Supreme Court denied all of petitioner's habeas claims except for
15 ground II (trial counsel's prejudicial deficiency in failing to call petitioner as a witness in his own
16 behalf), and remanded this single ground to the Appellate Court with instructions to issue an order to
17 show cause, returnable upon the Marin County Superior Court. (In re Voelker, (2007) DJDAR 201.)
18 Ground II was briefed, an evidentiary hearing was conducted, and the same judge who had previously
19 denied the past petition again denied it.

20
21 VII.

22 Meanwhile, petitioner filed a supplemental pleading in the Marin County Court, in which he
23 claimed, inter alia, that it was error for his jury to be guided by aiding and abetting instructions in
24 determining whether or not he had personally inflicted great bodily injury. In response to that
25 pleading the Marin County Superior Court issued an order stating that, "Petitioner has made a *prima*

1 *facie* showing" on the issues. (2/20/07 Marin County Super. Court Order at p. 1; Case No.
2 SC152013A.) The court then summarily denied the petition (4/4/07 Marin County Super. Ct. Order.)

3 VIII.

4 Petitioner then filed a new consolidated habeas petition in the First District Court of Appeal;
5 the petition was summarily denied on the merits. The California Supreme Court declined to grant
6 discretionary review. However, Kennard, J., was of the opinion the petition should have been granted.

7 IX.

8 This current petition is a timely federal petition for writ of habeas corpus. The current issues
9 are being presented to this Honorable Court pursuant to this Court's jurisdiction under 28 U.S.C. §
10 2254. Petitioner *has exhausted all state remedies*, has met the AEDPA's timeliness provisions, and
11 has filed no previous pleadings in Federal Court. (McQuown v. McCartney (9th Cir. 1986) 795 F.2d
12 807, 809; 28 U.S.C. § 2254(b).)

13 X.

14 STATEMENT OF THE FACTS²

15 Late on the night of November 7, 2003, petitioner met Damian DiPrima in a bar in San
16 Anselmo—Matteucci's. At about 2:30 a.m., DiPrima drove petitioner to petitioner's third-floor
17 apartment in San Rafael. DiPrima may have gone there to buy and/or smoke marijuana. Soon after
18 arriving, DiPrima was attacked, severely beaten, and robbed. He lost his driver's license, keys,
19

20
21
22 ² This statement of facts is a summary taken from the Reporter's ("RT") Transcript of the trial and
23 sentencing proceedings. Petitioner asserts that, based on extrinsic evidence—evidence that was
24 brought forth in subsequent state collateral proceedings—the instant federal proceeding will
25 demonstrate that the determination of facts in the unpublished opinion of the California Court of
Appeal, First Appellate District, is unreasonable. (28 U.S.C. § 2254 (d)(2).) Petitioner further
asserts that the petition, in *passim*, presents clear and convincing evidence that demonstrates that
the state-court findings are in error. (28 U.S.C § 2254(e)(1); Taylor v. Maddox (9th Cir, 2004) 366
F.3d 992, 1000.)

1 cellphone, money clip, watch, necklace, shoes, and all his clothes except his pants and underpants (in
2 which he had defecated during the attack). A stomping to the top of the head opened a wound that
3 required five staples. He escaped the assault by running onto the balcony and jumping some thirty
4 feet to the ground below.

5 Two of the assailants were black males. One was referred to at trial as "Bob Marley" because
6 he was wearing a hat with a Bob Marley patch on it. The other black male was referred to as the
7 "mulatto guy."³ Petitioner was arrested the next day. The two black assailants were not
8 apprehended.
9

10 According to the prosecution, petitioner acted in coordination with the two black men. (RT
11 1258, 1262, 1263; see RT 1324 [petitioner "orchestrated this robbery and violent attack with his
12 friends."].) The prosecution argued that petitioner lured DiPrima into the apartment and participated
13 in the subsequent attack by, at a minimum, keeping DiPrima in a chokehold from behind while the
14 two black males beat and robbed him. (RT 1268, 1324.)

15 The defense acknowledged that petitioner came to the apartment with DiPrima just before the
16 attack but argued that petitioner played no role in it. Defense counsel readily acknowledged that
17 DiPrima had been beaten but reminded the jury that the doctor testified that there was no medical
18 indication or evidence that DiPrima had been choked by petitioner. (RT 367-368.) Under the
19 defense theory, DiPrima, the two black males, and petitioner left the bar for petitioner's apartment
20 (RT 1291, 1293-1294, 1296, 1303) to "party." (RT 1309 ["They went up there to party."].) While
21 petitioner was on the phone with his ex-girlfriend, the two blacks attacked DiPrima over DiPrima's
22 use of the word "nigga." (See RT 220 [defense counsel's opening statement: "... Jason Voelker
23
24

25 ³ For simplicity, and because the matter is not in dispute, petitioner will also refer to the two
assailants as Bob Marley and the mulatto guy, as the parties did at trial.

1 shouldn't have to pay for what two other people did. That's not Jason Voelker's responsibility.>"; RT
2 1314 [defense counsel's closing argument: DiPrima was beaten, but petitioner did not do it].) When
3 the attack began, petitioner was in the back room on the phone with his ex-girlfriend, Raven Oliver,
4 when the black males attacked DiPrima when DiPrima used racial slander with the two black males.⁴
5 (RT 223; RT 1310, 1316-1317.)

6
7 Defense counsel asserted that DiPrima was falsely accusing petitioner because petitioner was
8 the only one being charged and was "the easiest person to get...." (RT 1315.)

9 Videotape from a 7-Eleven convenience store near petitioner's apartment established that
10 petitioner and DiPrima were in the store together at 2:15 a.m. (People's Exh. 34: RT 609.) At 2:39
11 and 2:40 a.m., the police received two 911 calls about the crime from neighbors. The second call
12 referred to DiPrima's jump from the balcony. The caller stated that someone had fallen off of a deck
13 and it appeared that one person was attempting to assist the other. The police arrived at the building
14 at about 2:45 a.m. No one was in the apartment. From a cursory check, the police concluded that
15 there were no definitive signs of a crime, although they did see an overturned table and chairs in the
16 living room and dried blood on one wall. After arresting petitioner the next day, the police searched
17 the apartment and found DiPrima's ripped necklace laying on the floor but none of his other
18 belongings were located. At this time, the police also recovered the "Bob Marley" hat outside the
19 apartment building.
20

21 In his opening statement and closing argument, defense counsel stressed that petitioner was on
22 the telephone with his ex-girlfriend during the attack. (RT 223, 1304, 1306, 1310, 1315.) Asserting
23 that the attack on DiPrima was occurring while petitioner was on the phone, defense counsel argued
24

25 ⁴ DiPrima testified that he uses the "N" word loosely, as a "term of endearment." (CT 19—Clerk's Transcript.)

1 that petitioner could not have been assaulting DiPrima while petitioner was in the other room talking
2 on the phone with his ex-girlfriend. (RT 1307-1308, 1316-1317.) The defense produced a
3 documentary indication of the calls in the form of Oliver's cellphone bill (CT 431-432), which was
4 marked as defense Exhibit C. (RT 1060-1064.) The bill shows calls from the same number (415-
5 459-7063, which Oliver said was petitioner's—RT 1065) at 2:24 and 2:36 (CT 431-432.)
6 However, Defense Exhibit C (Raven Oliver's phone bill) was not admitted into evidence because
7 defense counsel admittedly failed to submit the phone records into evidence. (RT 1163; CT 304.)
8

9 On Monday, February 23, 2004, as the defense was nearing an end, the court sua sponte asked
10 if petitioner would be the last defense witness and how long direct examination would be. Trial
11 counsel informed the court that "yes," petitioner would be testifying and that petitioner's testimony
12 would take about an hour. (RT 1198.) The court then recessed for the day. The very next morning
13 trial counsel filed the defense's requested CALJIC instructions. The requested instructions were
14 explicitly constructed for the purpose of placing petitioner on the witness stand. (CT 310.) However,
15 the next morning trial counsel summarily rested the case without calling petitioner as a witness in his
16 own behalf. (Discussed post I.)
17

18 In her closing argument, the prosecutor discredited the defense by telling the jury that there
19 were no phone records establishing that petitioner was actually on the phone. (See RT 1319
20 [prosecutor's closing argument: "there is absolutely no certified record or attested to phone bill that
21 will tell you that the phone call was actually made."]; RT 1325 ["DiPrima told you that when he
22 jumped off that balcony, the defendant was still present in that apartment. It makes no sense to
23 believe that he was supposedly on the phone with his girlfriend ... it makes no sense to believe that he
24 was actually on the phone...."]
25

1 During the first half-hour of deliberations, the jury sent a note to the court requesting to see
2 the phone records that would prove whether or not petitioner was in fact on the phone. After
3 conferring with counsel, the trial judge sent a note informing the jury that there were, in fact, no
4 phone records for them to view. The jury's request to see the phone records was ultimately denied
5 because defense counsel failed to subpoena the certified phone records in time for the trial.
6 (Discussed post II.)

7
8 Another much-discussed issue in the trial was DiPrima's use of the word "nigga." According
9 to the prosecution, DiPrima used the racial term affectionately with petitioner (who is white) while
10 asking him to move over so that DiPrima could buy a drink at the bar. "Bob Marley" was also at the
11 bar, and became offended. DiPrima apologized. (RT 1260-1261.) According to the defense,
12 DiPrima used the racially charged word not in the bar but back at the apartment. The defense further
13 asserted that the racial slander is what precipitated the two black males attacking DiPrima in
14 petitioner's apartment while petitioner was in the other room talking on the phone with his ex-
15 girlfriend, Raven Oliver. (RT 1309, 1314-15.)

16 PROSECUTION'S CLOSING STATEMENTS

17 The prosecution argued that the petitioner and other suspects hatched and calculated a plan to
18 attack and rob DiPrima after the 'N' word incident. (RT 1260-1263.) She argued that the suspects
19 ambushed DiPrima within seconds of entering the apartment and that petitioner was present during
20 the entire time. (RT 1267.) She characterized petitioner's role by saying, "everything goes back to
21 [Petitioner] Voelker—his idea, his plan, his friends, his apartment." (RT 1282.) She emphasized
22 that the defense presented no certified phone records to show that a phone call actually occurred from
23 petitioner's apartment to Oliver. (RT 1319.) The prosecutor repeatedly argued that it made no sense
24 that petitioner would be on the phone with Oliver during the assault and attacked Oliver's credibility.
25

1 (RT 1325, 1319.) The prosecutor also informed the jury that they could, in any event, find petitioner
2 guilty as an aider and abettor. (Discussed post IV.)

3 DEFENDANT'S CLOSING STATEMENT

4 The defense attorney argued that the facts showed no plan. It made no sense to plan out an
5 attack that wouldn't work unless DiPrima came to the apartment—a complete uncertainty. (RT
6 1292.) It made no sense for the petitioner to use DiPrima's phone if he was going to rob DiPrima a
7 short time later. (RT 1304.) The defense argued that DiPrima went to the apartment with everyone
8 and that the 'N' word incident occurred at the apartment at which time the argument began that led to
9 the fight. (RT 1307, 1309.) The defense attorney reminded the jury that there was no medical
10 evidence of a choke and argued that if the jury believed DiPrima that they would have to disbelieve
11 the police, the investigators, Darko and DiPrima's girlfriend, Melinda Swanson. (RT 1306.) The
12 defense proffered that petitioner was the one that said, "he's cool," referring to DiPrima and that
13 petitioner could not be choking DiPrima if petitioner was on the phone with Raven Oliver during the
14 assault. (RT 1310, 1316-1317.)

16 JURY'S DELIBERATION

17 During the first half-hour of deliberations, the jury sent a note to the court requesting to see
18 the phone records that would prove whether or not petitioner was in fact on the phone at the time of
19 the assault. After conferring with counsel, the trial judge sent a note informing the jury that there
20 were, in fact, no phone records for them to see. The jury's request to see the phone records was
21 ultimately denied because defense counsel negligently failed to subpoena the certified phone records
22 in time for the trial. (Discussed post II.) Shortly thereafter the jury reached a guilty verdict on all
23 counts.
24
25

XI.

Petitioner has no other plain, speedy or adequate remedy at law in that the present issues are only fully reviewable by a consideration of the facts presented in this federal petition for writ of habeas corpus.

XII.

In support of this petition, petitioner relies upon the petition, the supporting memorandum of law, the record on appeal and the Exhibit portion attached, which are incorporated herein by reference.

XIII.

Petitioner is currently unlawfully incarcerated in violation of the United States Constitution and confined at Folsom State Prison in Represa, California, pursuant to a judgment pronounced by the Marin County Superior Court.

XIV.

CONTENTIONS

This Petition is based upon the following grounds:

GROUND ONE: Petitioner's constitutionally protected right to present a defense and testify in his own behalf was violated by trial counsel when counsel prejudicially failed to call petitioner as a witness in his own defense;

GROUND TWO: Trial counsel's admitted failure to introduce into evidence phone records that would have corroborated petitioner's defense denied petitioner the right to the effective assistance of counsel, in violation of clearly established Federal law, as determined by the Supreme Court of the United States;

1 **GROUND THREE:** California's denial of petitioner's right to present newly discovered
2 evidence that establishes his innocence violated petitioner's constitutional right to equal protection,
3 due process and fundamental fairness under the United States Constitution;

4 **GROUND FOUR:** The trial court committed prejudicial constitutional error when it failed
5 to instruct on the specific intent element required for petitioner to be found guilty of aiding and
6 abetting.

7 **GROUND FIVE:** Cumulatively, the errors in this case prejudiced petitioner's rights to due
8 process, a fair trial and effective assistance of counsel such that reversal of his conviction is
9 compelled; furthermore, trial counsel has conceded to rendering ineffective assistance of counsel;

10 **GROUND SIX:** There is insufficient evidence to support the jury's finding of *personal*
11 infliction of great bodily injury;

12 **GROUND SEVEN:** The trial court committed prejudicial constitutional error when it
13 instructed the Jury with aiding & abetting instructions and CALJIC No. 17.20 regarding personal
14 infliction of great bodily injury as a result of a group beating; thus, lowering the prosecutions burden
15 by omitting an element of the crime;

16 **GROUND EIGHT:** The infliction of great bodily injury enhancement was wrongly
17 reinstated.

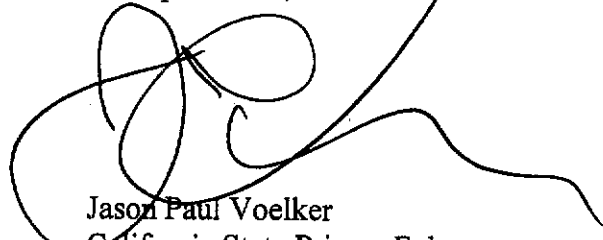
18 Due to the above, petitioner's imprisonment is in violation of his Federal Constitutional rights
19 as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States
20 Constitution.
21
22
23
24
25

1 **WHEREFORE**, petitioner prays that the Court grant the following relief:

- 2 1. Order that the Warden of Folsom State Prison, at Folsom, California, and the California
3 Department of Corrections **show cause** why this Court should not vacate the judgment and
4 sentence in Marin County Superior Court No.: SC132406A;
5
6 2. Order Respondent to lodge with this Court all state proceedings, and the record on appeal in
7 People v. Jason Voelker, A108798;
8
9 3. Order an evidentiary hearing so that the Court may corroborate petitioner's claims and resolve
10 any possible conflicts in evidence;
11
12 4. Appoint counsel to represent petitioner in this matter, and if appropriate, afford counsel the
13 opportunity to invoke the Court's processes to supplement/amend the current petition in a way
14 that protects petitioner's constitutional rights;
15
16 5. Issue a Writ of Habeas Corpus, vacating petitioner's unconstitutional conviction;
17
18 6. Order any and all relief that this Court deems just and proper.

19 Dated: 3-1-08

Your petitioner,



Jason Paul Voelker
California State Prison, Folsom
P.O. Box 950
Folsom, CA 95763
Prison I.D. V-62496

In propria persona

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

GROUND ONE: PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE AND TESTIFY IN HIS OWN BEHALF WAS VIOLATED BY TRIAL COUNSEL WHEN COUNSEL PREJUDICIALLY FAILED TO CALL PETITIONER AS A WITNESS IN HIS OWN BEHALF.

(1). **Introduction**

Defense Attorney James Wall denied petitioner's constitutional right to *present a defense* and testify in his own behalf. As a result, petitioner's rights to the effective assistance of counsel, due process, a fair and reliable trial, and his Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were violated.

(2). **Standard of review**

A defendant's right to testify is a personal right of fundamental dimension. (Rock v. Arkansas, (1987) 483 U.S. 44, 51-53.) While defense counsel has power to control proceedings on behalf of a defendant, that power may not be exercised to deprive the defendant of the right to testify in ones own defense. However, if a defendant is denied his right to testify by defense counsel he must seek relief, if any is due, by showing ineffective assistance of counsel. (United States v. Joelson, (9th Cir. 1993) 7 F.3d 174, 179 [When the record before the court is insufficient to evaluate a claim of ineffective assistance of counsel regarding counsel's refusal to allow his client to testify, a petitioner may raise these claims in a collateral proceeding in order to develop a record regarding his attorney's failure].)

In United States v. Teague, (11th Cir. 1992) 953 F.2d 1525, the court held that "a criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. This right is personal to the defendant and cannot be waived either by the trial court or by defense counsel." Id. at 1532. It was also held that ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, is a proper framework in which to address a claim in which petitioner's right to testify was

1 violated, not by the government, or the trial court, but by his own attorney. Teague, at 1534; accord
2 Joelson, supra, at p. 179

3 In Strickland v. Washington 466 U.S. 668, the United States Supreme Court outlined the
4 requirements for a claim of ineffective assistance of counsel. This requires showing that counsel's
5 performance was deficient and requires a showing that counsel was not functioning as the "counsel"
6 guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient
7 performance prejudiced the defense. This requires showing that counsel's errors were so serious as to
8 deprive the defendant of a fair trial whose result is reliable, Id. at p. 687.

9
10 In the California state courts, petitioner argued that he was denied the right to effective
11 assistance of counsel because his attorney prejudicially failed to call petitioner as a witness in his own
12 defense. The California Supreme Court granted review and remanded to the Marin County Superior
13 Court for factual findings on this particular issue. (In re Voelker (2007) DJDAR 201.) The Marin
14 County Superior Court denied habeas relief after finding that petitioner had failed to prove by a
15 "*preponderance of the evidence*" that he had been denied his constitutional right to the effective
16 assistance of counsel. (See Exhibit D [6/27/07 Marin County Superior Court order].) The California
17 Supreme Court declined to review. (Kennard, J., dissenting.) This federal petition follows.

18
19 Petitioner understands that this Court may not grant a petition for writ of habeas corpus by a
20 person in state custody with respect to any claim that was *properly* adjudicated on the merits in state
21 court unless it (1) "resulted in a decision that was contrary to, or involved an unreasonable application
22 of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2)
23 "resulted in a decision that was based on an unreasonable determination of the facts in light of the
24 evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti
25 (2002) 537 U.S. 19, 21.

1 "[U]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court
2 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the
3 state court decides a case differently than [the Supreme] Court has on a set of materially
4 indistinguishable facts." Williams v. Taylor (2000) 529 U.S. 362, 412-413. And "[a] state court
5 decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state
6 court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." Id. at 405.
7 For example, a habeas petition could be granted if, in spite of the rule in Strickland v. Washington
8 466 U.S. 688, 694 (1984)—that a petitioner urging ineffective assistance of counsel need only
9 show a "reasonable probability" of prejudice—a state court required the petitioner to show
10 prejudice by a preponderance of the evidence. Williams, 529 U.S. at 405-406. When a state court
11 commits such an error, "a federal court [is] unconstrained by § 2254 (d)(1)," Id. at 406, and *de novo*
12 review is appropriate.
13

14 In the instant case, the state courts required petitioner to prove his ineffective assistance of
15 counsel claim by a *preponderance of the evidence*; therefore, the state courts' determination on this
16 issue resulted in a decision that was contrary to clearly established Federal law, as determined by the
17 Supreme Court of the United States. (Williams, supra, 529 U.S. at 405-406.) Moreover, because the
18 state courts plainly misstated and omitted key aspects of the record, and those misapprehensions went
19 to material factual issues that were central to petitioner's claims, those misapprehensions fatally
20 undermined the fact-finding process, rendering the resulting factual determination unreasonable. (28
21 U.S.C. 2254(d)(1)&(2).)
22

23 Here, petitioner is presenting a constitutional challenge to the lower court's findings based on
24 its decision that was contrary to, and involved an unreasonable application of, clearly established
25 federal law, as determined by the Supreme Court of the United States. Petitioner's claim presents

1 several interesting sets of considerations. No doubt the simplest is the situation where the state courts
2 used the incorrect legal standard——preponderance of the evidence——in adjudicating petitioner's
3 ineffective assistance of counsel claim. (See e.g., Brown v Myers, (9th Cir. 1998) 137 F.3d 1154,
4 1156 [emphasizing that a habeas petitioner "does not have to show by a preponderance of the
5 evidence that the result in the case would have been different but for counsel's errors," but rather that
6 "counsel's errors undermine confidence in the outcome." Citing Strickland v. Washington, 466 U.S.
7 668].)

8
9 Here, the state courts' determination that petitioner did not prove by a preponderance of the
10 evidence that petitioner was denied the effective assistance of counsel was contrary to the rule set
11 forth in Strickland, and thus contrary to Supreme Court precedent.

12 Aside from being contrary, the state courts' determinations are unreasonable because they
13 should have made certain findings of fact but neglected to do so. In this situation, the California
14 courts' factual determinations are unreasonable and there is nothing to which the presumption of
15 correctness can attach. (See, e.g., Taylor v. Maddox (9th Cir. 2004) 336 F.3d 992, 1001, [where the
16 state courts plainly misapprehend or misstate the record in making their findings, and the
17 misapprehension goes to a material factual issue that is central to petitioner's claim, that
18 misapprehension can fatally undermine the fact-finding process, rendering the factual determination
19 unreasonable].) As petitioner will show, the state court outright misconstrued the record in making
20 its findings, and that misunderstanding went to several material facts that were central to petitioner's
21 claim.
22

23 In sum, the constitutional defects in the state courts' fact-finding process——failure to use the
24 correct legal standard and failure to consider and weigh relevant evidence that was properly presented
25

1 to the lower court and made part of the record—requires that this Court invoke a *de novo* standard
2 of review in adjudicating the instant claim.

3 In presenting the instant ineffective assistance of counsel claim, petitioner is mindful that the
4 lower court was not required to address and jot down every title of proof presented to it. To fatally
5 undermine the fact finding process, and render the resulting finding unreliable, the overlooked
6 evidence must be highly probative and central to petitioner's claim. In other words, the evidence in
7 question must be sufficient to support petitioner's claim when considered in context of the full record
8 bearing on the issue presented in the habeas petition. With these principals in mind, petitioner next
9 proceeds to the merits of his claim that he was prejudicially denied his fundamental right to testify
10 due to Trial Counsel Wall's failure to call petitioner as a witness in his own behalf.

12 During the trial, the defense presented evidence on February 20 and 23, 2004. (CT 302-303,
13 307-308.) After the last of the subpoenaed defense witnesses had testified on February 23, the trial
14 court announced that "we've broken for the day because [the] defense hasn't decided whether to call
15 Mr. Voelker, and I'm sure that decision will be made in the fullness of time, however we have some
16 Castro and Wheeler issues that we have to deal with if Mr. Voelker testifies." (RT 1195.)⁵ The court
17 ruled that the prosecution could impeach petitioner with a conviction from January 22, 2004, and with
18 conduct leading to that conviction on March 22, 2002, for drug possession. (RT 1196-1197.)

19 The prosecutor then argued that if petitioner were to testify he also should be impeached by
20 statements the police took from him in violation of Miranda v. Arizona (1966) 384 U.S. 436. (RT
21 1197-1198, 1204.) The defense did not contest any of these rulings or arguments.

23
24 5 In its Order, the state court relied on this comment to show that the decision whether to call
25 petitioner to testify had not been made. (6/27/07 Order at p. 5.) However, the state court's
reasoning is flawed because it fails to mention an exchange that occurred moments later between
the court, defense counsel (James Wall), and the prosecutor (Ashley Worsham) in which Mr. Wall
informed the court that petitioner was indeed going to be testifying. (RT 1198.)

1 As the prosecutor was looking through her notes for authority to support her position that
 2 petitioner could be impeached with his statements to the police, the following exchange occurred:

3 THE COURT: All right. Well, will Mr. Voelker be
 4 your last witness probably?

5 Mr. WALL: Yes, ma'am.

6 THE COURT: And do you have any idea how
 7 long your direct examination will be?

8 Mr. WALL: Probably an hour.
 9 (RT 1198.)

10 The court then recessed for the day in preparation for the testimony petitioner would be
 11 presenting in the morning. The following morning (Tuesday, February 24, 2004), Mr. Wall lodged
 12 the defense's requested jury instructions—specifically, Mr. Wall requested CALJIC 2.13.1,
 13 statement obtained in violation of Miranda v. Arizona. (CT 310.)⁶ However, when the proceedings
 14 resumed, Mr. Wall summarily rested the case without calling petitioner as a witness.

15 On December 22, 2004, Mr. Wall told the court that a conflict had arisen between him and
 16 petitioner and that counsel did not think his continuing as defense counsel was in petitioner's best
 17 interests. (RT 1379.) The court held an in-camera hearing (RT 1380), a transcript of which is
 18 attached as Exhibit F. At the in-camera hearing petitioner informed the court of, inter alia, his desire
 19 to testify: "I also wanted to testify. I wasn't given that chance either." (In-camera hearing transcript
 20 at p. 4.) When given the opportunity to explain the alleged improprieties, Mr. Wall did not indicate
 21 that he had not denied petitioner's right to testify, rather, he indicated that he had made a "huge
 22 mistake" in petitioner's trial. Counsel went on to confess that he had "inadequately" performed part
 23 of his job in the trial as well. (In-camera hearing transcript at pp. 4-6.) Based on the facts of this
 24

25 ⁶ It would make no sense for counsel to have requested this instruction on the exact day petitioner
 was intending to testify unless, of course, counsel intended to call petitioner as a witness.

1 case—in particular, that petitioner's right to testify had been invoked on the record—the
2 California Supreme Court remanded this issue for an evidentiary hearing in the Marin County
3 Superior Court.

4 Remarkably, in rendering its decision, the Marin County Superior Court did not acknowledge
5 any of the above exchanges between the court, petitioner and defense counsel. As detailed below,
6 these omitted facts strongly corroborate petitioner's account of the events and stand entirely
7 unrefuted. The Marin County Superior Court did not discredit Wall or petitioner's statements; it
8 simply chose to ignore them. For the reasons explained below, the state courts' failure to consider, or
9 even acknowledge Wall's highly probative statements casts serious doubt on the state courts' fact-
10 finding process and compels the conclusion that the state courts' decision was based on an
11 unreasonable determination of the facts. (See Taylor v. Maddox, supra, at p. 1005 [the state courts'
12 failure to acknowledge probative testimony demonstrates that the state-courts' decision was based on
13 an unreasonable determination of the facts].)

14 While Wall's testimony is perhaps not conclusive, it is certainly highly probative. A rational
15 fact-finder might discount it or, conceivably, find it incredible, but no rational judge would simply
16 ignore it. Yet this is precisely what the state court did in petitioner's case. At the end of the
17 evidentiary hearing, the lower court found that petitioner had: 1) failed to prove by a "preponderance
18 of the evidence" that he had been denied the right to the effective assistance of counsel; and 2) that
19 "...petitioner acquiesced, perhaps reluctantly..." in the loss of his right to testify. (See Order at p 1-6)

20 In making its ruling, the court said nothing at all about Wall's statements, nor even so much as
21 to acknowledge that Wall had invoked petitioner's right to testify in the trial and admitted his
22 ineffectiveness several months later, even though the importance of these statements were vigorously
23 argued in petitioner's briefs.
24
25

1 The lower court was supposed to consider the entire record, not individual pieces of evidence
2 standing alone. This reflects the philosophy of the American fact-finding process—specifically,
3 that various pieces of evidence and testimony in the record must be considered in light of the others.
4 (See Taylor v. Maddox at p. 1007-1008.) For example, petitioner's assertion that he wanted to testify
5 may have seemed implausible standing alone, yet gain considerable force when confirmed in a
6 material respect by Mr. Wall informing the court that petitioner's direct testimony would last "about
7 an hour." By contrast, the state courts' failure to take into account and reconcile key parts of the
8 record, such as Wall admitting his ineffectiveness, casts serious doubt on the process by which the
9 court's finding was reached, and hence the correctness of the court's finding. See, e.g., Winans v.
10 Bowen, 853 F.2d 643, 647 (9th Cir. 1988) [the court's failure to give specific reasons for ignoring
11 treating physician's opinion constitutes grounds for reversal]; Gui v. INS, 280 F.3d 1217, 1228 (9th
12 Cir. 2002) [the court's failure to support adverse credibility finding with specific, cogent reasons
13 constitutes grounds for reversal]; Taylor v. Maddox (9th Cir. 2004) 336 F.3d 992, 1001 [the state
14 court's failure to give particular reasons for omitting attorney's statements constitutes grounds for
15 reversal].

17 As noted, the state courts did not so much as mention Jim Wall's statements in ruling on the
18 habeas corpus petition, much less discuss what light this testimony would cast on petitioner's
19 assertion that he was denied his constitutional right to testify. This was a major omission. Wall was
20 not a random person making statements to a collateral detail. Rather, he was the very lawyer that
21 petitioner claims denied him of his right to testify. As discussed below, the very fact that Wall
22 admitted his ineffectiveness moments after petitioner informed the court that he was denied the right
23 to testify, makes Wall's statements highly probative. The state court might have disbelieved Wall, or
24 perhaps discounted his statements, but it was not entitled to act as if his statements didn't exist.
25

1 The United States Supreme Court has held that a court's failure to consider key aspects of the
2 record is a defect of the fact-finding process. (Miller-El v. Cockrell (2003) 537 U.S. 322, 346.) How
3 serious the defect, of course, depends on what bearing the omitted evidence has on the record as a
4 whole. Here, Wall's statements are significant. In trial, as the defense had completed calling all of
5 its subpoenaed witnesses, the court asked Wall if petitioner would be the last witness for the defense
6 and how long petitioner's direct examination would be. Wall informed the court that "yes," petitioner
7 would be testifying and that petitioner's testimony would take about an hour. Such an unequivocal
8 statement constitutes an adequate and timely assertion of petitioner's right to testify. (RT 1198.) The
9 court then recessed for the day in preparation for the last defense witness: petitioner. However, the
10 next morning trial counsel summarily rested the case without calling petitioner as a witness in his
11 own behalf, in direct violation of petitioner's desire to testify.

13 Later, on December 22, 2004, the court conducted a conflict in-camera hearing. In that
14 hearing, petitioner informed the court that he had wanted to testify and that he "wasn't given that
15 chance." When given a fair opportunity to respond to petitioner's contentions, Wall informed the
16 court that he had made a "huge mistake" and he confessed that he had "inadequately" performed part
17 of his job in the trial.

18 The superior court judge, having been informed of all of the above inadequacies, never
19 concluded whether counsel's performance was within the range of reasonable professional assistance.
20 By failing to consider Wall's factual statements—that petitioner would be testifying, that his direct
21 testimony would last about an hour and that he had made a huge mistake—the state court ruled that
22 "... Petitioner acquiesced, perhaps reluctantly...." in the loss of petitioner's right to testify. (Order at
23 p. 5.) This conclusion by the lower court essentially obviated the court's duty to analyze petitioner's
24 ineffective assistance of counsel claim under the framework of Strickland v. Washington; a
25

1 conclusion which is *contrary* to United States Supreme Court precedent. Moreover, the record does
2 not support such a conclusion. The record shows that the court was indeed alerted that petitioner was
3 going to testify. (See RT 1198; CT 310.)

4 By making its findings without taking any of the above factual statements into account, the
5 state courts not only came to a conclusion that was contrary to U.S. Supreme Court precedent, but
6 they made an unreasonable determination of the facts and failed to reach the question of prejudice.
7

8 (3). **Prejudice**

9 In considering the second prong of Strickland, petitioner respectfully requests that this Court
10 take a *de novo* review of the record in order to evaluate the prejudicial effect of defense counsel's
11 failure to call petitioner as a witness in his own behalf.

12 The key controversies in this trial focused on how the robbery and attack transpired and what
13 petitioner did or didn't do. Did he participate? Did he stand by? Was he really on the phone when
14 this was happening? Did he come to the aid of the victim? Was he in the room for all or part of the
15 incident? Was the fight and robbery contrived ahead of time or did the fight/attack erupt in the
16 apartment—a spark from the argument over the "N" word at the location? The jury had to answer
17 these questions with just one witness, the victim, whose testimony about these events wasn't all that
18 clear. When questioned about any details or inconsistencies, or why he couldn't remember facts, he
19 told the jury the following: "cause I got my head beat to a pulp" (RT 484); "you know, I don't recall a
20 lot of stuff cause my head's been beat up so bad that it's like, how am I supposed to remember
21 everything"? (RT 450); "you know, I—I got—my head beat in, like, how am I supposed to
22 remember at what time, like that goes on? I mean, it's just like—come on"? (RT 481); "I don't
23 remember too much about it—it was real emotional." (RT 453) When questioned about specifics
24 he simply had to answer I have no idea. I have no clue. I don't know. I can't tell you. I'm not sure
25

1 how all that happened. I don't recall a lot of stuff. At one point in the trial he testified that petitioner
2 had hit and kicked him, but later he admitted that, in reality, he did not know if petitioner had ever
3 struck him. (RT 492-494, 583.) He even identified with certainty one of his attackers, i.e., Vijay
4 Kelly—and it turned out to be the wrong person. He did not remember the incident with any
5 clarity or certainty. He also testified:

6 "Mr. Wall [Trial Counsel]: Q. Do you -- do you know
7 where Mr. Voelker's phone was in his apartment that day--

8 A. [DiPrima] I do not.

9 Q. -- if at all? Okay. Do you know if he used the phone
10 that day?

11 A. I do not.

12 Q. So it's possible that when you were in his apartment, he
13 used the phone?

14 A. Maybe he did.

15 Q. Well -- but you said he was virtually around you the
16 whole time. How could he use the phone when -- he was right
there with you?

17 A. I wouldn't know if he used the phone 'cause I was beat
18 up the whole time and ... I couldn't see anything.

19 Clearly, DiPrima was not sure if petitioner was on the phone or not; and he ultimately testified
20 that he didn't know if petitioner had ever hit him. (RT 583.) Petitioner's defense was that he had
21 brought several people back from the bar to hang out and smoke some marijuana. While petitioner
22 was in the other room talking on the phone with his ex-girlfriend the fight broke out between DiPrima
23 and the two black males. Petitioner's testimony would have been enormously important, and
24 corroborated by phone records and other circumstantial evidence. (See Exhibit A, the Evidentiary
25 hearing transcripts, attached hereto and incorporated herein by reference as though set forth in full.)

1 In this case, petitioner was present at the scene of the crime while talking on the phone, but
2 when he realized what was happening he tried to come to the assistance of the victim. In no way did
3 petitioner aid or abet the actual assault and robbery. Having never heard petitioner's testimony, the
4 jury could not have fully assessed petitioner's version of the above events, his credibility and
5 demeanor, or any other aspect of his involvement that would have reinforced the above defense.
6 Here, defense counsel failed to present petitioner's side of the facts and shore up the holes in the
7 testimony of the prosecution's only percipient witness. Counsel's failure to call petitioner to the
8 stand was *not* a tactical maneuver. On the contrary, it was a deviation from the defense's original
9 game plan; thus, violating petitioner's express desire to testify while highly prejudicing petitioner's
10 defense.
11

12 Before reaching the conclusion of this issue it should be summarized with the following facts:
13 1) Petitioner's decision to testify was in the affirmative and tactically recommended by trial counsel;
14 2) Prior to the trial, petitioner was admonished, by trial counsel, that he was never to speak to the
15 court except through trial counsel; 3) the court sua sponte asked if petitioner would be testifying; 4)
16 trial counsel voiced petitioner's desire to testify by informing the court that petitioner would be
17 testifying—such an unequivocal statement constitutes an adequate and timely assertion of
18 petitioner's right to testify; 5) counsel never called petitioner to the stand; 6) later, on December 22,
19 2004, the court conducted a conflict in-camera hearing. In that hearing petitioner informed the court
20 that he "wanted to testify" and "I wasn't given that chance." Trial counsel's subsequent rebuttal
21 consisted of him admitting that he had made a "huge mistake" and he confessed that he had
22 "inadequately" performed part of his job in the trial. Petitioner asserts that counsel's above remarks
23 equate a solemn declaration which, as him being an officer of the court, carry a strong presumption of
24 verity.
25

(4). Conclusion

As the court noted on record, conflicting evidence was presented to the jury (RT 1217.) The verdicts could have gone either way—no one would have been surprised if the verdicts came back "not guilty." All things being equal—it was a close call on the issue of petitioner's roles in the crimes. Thus, testimony that would have set him apart from the two black perpetrators was critical. In not calling petitioner to the stand, counsel "dropped the ball," violated petitioner's right to present a defense, and denied him his constitutional right to the effective assistance of counsel. But for counsel's errors, there is a reasonable probability of a different outcome.

GROUND TWO: TRIAL COUNSEL'S ADMITTED FAILURE TO INTRODUCE EXCULPATORY EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL; THUS, DENYING PETITIONER A FAIR TRIAL AND A RELIABLE JURY VERDICT IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS.

"[T]here's an ineffective assistance claim, which I think is valid here, on an appeal, I -- I firmly do believe that's a valid claim ... I believe that I made a huge mistake ... I don't want him to be the person who loses because of that. I'm the one who should lose because of that, that's on me, as an attorney. Jason shouldn't lose ... I can also say that I feel very guilty, and I felt like I did inadequately do part of my job in this trial." (Exhibit F [Post trial quote from James A. Wall, trial counsel], Page 5-6 of in-camera hearing transcript re attorney conflict Dec. 22, 2004.)

(1). Introduction

In this case, trial counsel was very much aware that there were phone records that existed and established exculpatory evidence. Indeed, he stressed their existence by explaining to the jury that these exculpatory phone records placed petitioner on the phone in the other room when the assault exploded in petitioner's living room. The prosecutor, on the other hand, told the jury that no such phone records existed and that petitioner was never actually on the phone. During the first 30 minutes of deliberations the jury *requested to see the phone* records in order determine if petitioner was in fact on the phone at the time of the assault. After conferring with counsel, the trial judge sent

1 the jury a note informing them that there were in fact no phone records for them to see.
2 Consequently, petitioner's defense was easily discredited. The absence of these material phone
3 records hampered petitioner's defense, allowed a key defense witness to be falsely impeached, and
4 completely undermines the jury's verdict.

5
6 (2). **Standard of Review**

7 A defendant's criminal lawyer has a "duty to make reasonable investigations or to make
8 reasonable decisions that makes particular investigations unnecessary." Strickland, supra, 466 U.S. at
9 691; Turner v. Duncan, 158 F.3d 449, 456 (9th Cir. 1998). This includes a duty to investigate the
10 prosecution's case and to follow up on exculpatory evidence. Kimmelman v. Morrison, 477 U.S. at
11 385; U.S. v. Tucker, 716 F.2d 576, 583 fn. 16 (9th Cir. 1983). Thus, a lawyer's performance is
12 deficient if evidence exists that might show a defendant's innocence or raises sufficient doubt to
13 undermine confidence in a guilty verdict, and the lawyer did not present the evidence. Lord v. Wood,
14 184 F.3d 1083, 1093 (9th Cir. 1999); Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir.) ["A lawyer who
15 fails adequately to investigate, and introduce into evidence, records that demonstrate his client's
16 factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the
17 verdict, renders deficient performance."]

18 The state courts never allowed petitioner an opportunity to fully develop this claim. In the
19 state, petitioner requested an order to show cause and an evidentiary hearing on this issue, but the
20 issue was summarily denied without ever giving petitioner an opportunity to present readily available
21 evidence, law or arguments in an evidentiary hearing. (28 U.S.C. § 2254(e)(1); Taylor v. Maddox
22 (9th Cir, 2004) 366 F.3d 992, 1000.) (28 U.S.C. § 2254(d)(1) & (d)(2).)
23
24
25

1 **(3). Counsel's Admitted Failure to Introduce Material Phone**
 2 **Records into Evidence Resulted in Great Prejudice to Petitioner's Defense.**

3 After petitioner's arrest he informed his trial attorney that on the night of the incident he had
 4 invited several people back from the bar to hang out and smoke some marijuana at his apartment.
 5 Upon entering his apartment, petitioner passed out some marijuana and a little alcohol was consumed.
 6 Petitioner then got on the telephone with his ex-girlfriend. While talking on the phone, petitioner
 7 heard a lot of noise coming from his living room. Upon further investigation he saw that two of his
 8 guests were assaulting one of his other guests. Petitioner subsequently jumped in between the
 9 altercation and tried to break it up. While he was trying to help, he saw the victim, DiPrima, get hit
 10 over the head with a fire-log. Petitioner then saw DiPrima jump off of petitioner's third story
 11 balcony to getaway from the assault. Petitioner subsequently ran outside to help DiPrima. (See
 12 Exhibit E, [Declaration of Jason Voelker] ¶ 3-6; and Exhibit A [Evidentiary Hearing Transcripts].
 13 See also Exhibit I [Karlán Brooks' interview] ¶ 1-10, attached hereto and incorporated herein by
 14 reference [Brooks saw petitioner "come out from under the garage area and run up to the guy who
 15 had flown off the balcony." Brooks heard petitioner ask the man lying on the ground "Are you
 16 alright? Do you need an ambulance?"].)

17
 18 Here, Attorney Wall knew that petitioner's home phone records constituted exculpatory
 19 evidence—corroborating petitioner's side of the facts and placing petitioner on the phone at the
 20 time of the assault. In fact, prior to the trial, attorney Wall told petitioner that petitioner's successful
 21 defense was contingent upon petitioner's testimony in conjunction with his home phone records. (See
 22 Exhibit E, Declaration of Jason Voelker; see also Exhibit A, the Evidentiary Hearing Transcripts.)
 23 Yet Wall never subpoenaed petitioner's home phone records for the trial.

24 Before the trial, Wall sent a defense investigator to interview petitioner's ex-girlfriend, Raven
 25 Oliver. Raven Oliver confirmed what petitioner had told attorney Wall—that she had been on the

1 phone with petitioner when she heard a fight breakout in the background of petitioner's apartment.
2 The record discloses that Oliver then gave her telephone records to the investigator. (RT 1161-1162.)
3 The investigator then "used that phone bill to prepare a written report...." (RT 1164.)

4 During trial, Attorney Wall told the jury that the facts showed no plan. It made no sense for
5 petitioner to plan out an attack at his own apartment. Wall argued that while in the apartment
6 DiPrima used a racially charged word which provoked the black males into attacking DiPrima while
7 petitioner was in the other room talking on the phone with his ex-girlfriend, Oliver. (RT 1307, 1309,
8 1314-1315.) Wall stated that if everyone arrived at petitioner's apartment around 2:24 and the 911
9 call didn't occur until 2:40—then there must have been some normal socializing going on for a
10 while and no one immediately attacked DiPrima. (RT 1306.) The police found four beer bottles
11 inside the apartment (there were four people in the apartment). Then there would be the verbal
12 arguing and then the assault. (RT 1309.) Wall argued that if petitioner was on the phone at 2:36
13 a.m.—that is several minutes before DiPrima jumped from the balcony (the 911 calls came in at
14 2:39 & 2:40)—then it doesn't make sense that petitioner would be choking DiPrima at that time.
15 Wall argued that the phone records proved that the incident didn't occur in the manner in which
16 DiPrima testified and the fighting/argument didn't immediately occur, but rather developed over
17 DiPrima's use of the "N" word.
18

19 While on the witness stand DiPrima testified that he was yelling, "please stop ... I'm sorry,
20 please stop" because he believed the men were beating him "... over the "N" word." (RT 294-297,
21 492-493, 580-583, 811, 834.) DiPrima also testified that he had no idea if petitioner was on the
22 phone or not; and he ultimately testified that he didn't know if petitioner had ever hit him. (RT 583.)
23

24 The documentary phone records would have been extremely exonerating evidence for
25 petitioner's defense. Attorney Wall articulated so—he argued, to the jury, that petitioner couldn't

1 be attacking DiPrima if petitioner was in the other room talking on the phone with his ex-girlfriend.

2 (RT 1307.) See RT 1306, where attorney Wall argues:

3 So its 2:36 and [petitioner's] on the phone. He's telling Raven,
4 uncontroverted, that "I'm coming over." He -- Raven hears voices
5 arguing in the background. Wait a minute. Wait a minute. There
6 was no argument, until after the beating had started according to
7 Mr. Diprima. [¶] So, if Raven's on the phone with [petitioner] at
8 2:36 and there's an argument going on in the background, then
9 they're either already fighting or they have a fight, but that dispels
10 Mr. Diprima's story that he walked in and, bam, he was hit by Bob
11 Marley, bam, a mulatto guy hit him, bam, he was covered up, he
12 was down on the ground, he was banging.

13 * * *

14 Remember, Mr. Diprima says he goes in and immediately it
15 happens. Well, then how -- how do you get the fact that she's on
16 the phone at 2:36, talks for however long, and the report goes in at
17 2:40? so he jumps over the balcony right around 2:40. It doesn't
18 make sense that he's on the phone -- well, maybe -- maybe their
19 theory is he's on the phone, and he's choking him at the same time.
20 (RT 1307-1308.)

21 Wall told the jury that DiPrima, the two black males, and petitioner left the bar for petitioner's
22 apartment to "party." (RT 1309 ["They went up there to party."].) Wall argued that, while petitioner
23 was on the phone with his ex-girlfriend, the two blacks attacked DiPrima over DiPrima's unfortunate
24 use of the word "nigga." (RT 1310, 1316-1317.) However Wall never subpoenaed the phone records
25 that would have validated this defense.

26 Preparing a defense should be based on reasonable and rational foundations, both factually
27 and legally, in order to be valid and invulnerable. Any competently reasonable attorney would have
28 secured petitioner's phone records for the trial. Wall's failure to obtain these material records was not
29 reasonable or professionally acceptable, especially in light of the fact that petitioner's entire defense
30 necessitated these records.

Recognizing that Wall had failed to obtain his client's phone records, the prosecutor immediately highlighted counsel's failure; indeed, she devoted more of her closing argument to the phone records than trial counsel did. She emphasized that the defense presented no certified evidence to show that petitioner was on the phone during this time. The prosecutor repeatedly told the jury that it made no sense that petitioner would be on the phone during the assault. Furthermore, she began her rebuttal argument by arguing about the lack of any certified phone records.⁷ In other words, the prosecutor exploited defense counsel's failure to obtain the certified phone records and was particularly successful in placing skepticism in the jury's mind. We know that the jury was uncertain as to petitioner's defense because during the first half-hour of deliberations the *jury sought to verify the phone call by requesting the records*, but the trial judge denied their request, telling the jury that there were, in fact, *no phone records* for them to see. This presented a serious blow to petitioner's entire defense. The lack of the phone records conveyed to the jury that petitioner's defense was nothing more than a sham, and that the other evidence and testimony must be equally incredible just like the prosecutor had previously suggested. The prosecutor's argument had a pernicious effect, in

⁷ The prosecutor told the jury that the phone records did not exist, notwithstanding that the trial record shows that the prosecutor subpoenaed the phone records (RT-176) and had her very own photocopy of the records right in front of her during the trial. (CT 431-432; RT 1060-1064.) This was highly improper because through these implications she intended to do, and did in fact destroy petitioner's entire defense through fallacious tactics. Indeed, it is easy to see that the jury in this case was in fact misled; during deliberations *the jury's first request was to see the phone records*, but the trial judge denied their request.

Nevertheless, although a claim of prosecutorial misconduct may appear to have merit, petitioner believes it is not preserved for federal review and consequently can not be resolved on its merits. To preserve this issue, misconduct must be assigned as error at trial with a request that the jury is instructed to disregard its effect. Here, defense counsel failed to make any objection whatsoever to any of the instances where the prosecutor declared that the phone records did not exist. Thus, petitioner believes, precluding a later claim of prosecutorial misconduct.

In any event, had trial counsel properly subpoenaed the exculpatory phone records and submitted them into evidence—like a reasonable competent attorney would have done—the prosecutor would have been deterred from engaging in conduct of this sort.

1 that it sought to cut petitioner's defense by a tainted sword that made it appear that petitioner was
2 never on the phone and implied that his lawyer was attempting to mislead the jury and corrupt the
3 fact finding process. However, without the phone records, the defense was unable to prove that, in
4 fact, the Marin County Prosecutor was the one misleading the jury, not the defense.

5
6 There is no conceivable strategic or tactical reason not to use these records at trial. Having
7 chosen this line of defense, it is simply inconceivable that defense counsel's decision not to introduce
8 documentary phone records corroborating the defense was a strategic one. When faced with similar
9 examples of a defense counsel's failure to introduce exculpatory evidence, the courts have concluded
10 that the failure constitutes deficient performance under Strickland. See e.g., Hart v. Gomez, supra,
11 174 F.3d 1067, [holding that counsel provided constitutionally ineffective assistance where, inter alia,
12 "[h]aving chosen to pursue [a particular] line of defense," counsel did not introduce readily-available
13 records that would have corroborated that line of defense, and there was no plausible strategic reason
14 for his not introducing the evidence]. See also Smith v. Stewart, 140 F.3d 1263, 1269 (9th Cir. 1998)
15 [when the failure to present evidence is not based upon tactical considerations, "we have not hesitated
16 to find deficient performance"].

17
18 In this case, Wall argued that petitioner could not have been partaking in the assault and
19 robbery because he was on the phone. Given the substance of this defense, Wall had an affirmative
20 duty to present these material phone records to the jury, especially inasmuch as the prosecutor
21 vigorously denied that these phone records even existed; and the jury asked to see the phone records.

22
23 Even if trial counsel were to somehow offer a basis for his failure to obtain these phone
24 records for petitioner's defense, he would still need to provide a basis for why he allowed a material
25 defense witness, Raven Oliver, to be wrongfully impeached by the prosecution.

(4). The Wrongful Impeachment of Defense Witness Raven Oliver.

In trial, Oliver testified that she had been on the phone with petitioner when she "heard some yelling and some kind of confrontation..." erupting in the background of petitioner's apartment. (RT 1067.) Oliver's testimony was important because it demonstrated that she had been on the phone with petitioner when things got out of hand and got physical. The prosecutor, however, threw Oliver's credibility into doubt by insinuating that the phone records did not exist—suggesting that Oliver and petitioner merely created the timing of the phone calls after conspiring with each other. The prosecutor argued:

And if you recall from Raven Oliver's testimony, I never questioned her about the alleged phone call at 2:36 in the morning supposedly from this defendant. There is absolutely no certified phone record or attested to phone bill that will tell you that that phone call was actually made. [¶] What I asked Raven Oliver on cross-exam was, "Isn't it a fact that when you wrote out your statement about this incident for [the D.A. Investigator], you wrote that the defendant had called you between 11:30 and 12:00 o'clock in the morning, and that about 10 to 15 minutes later, he showed up. [¶] I then said, "Isn't it a fact that you later changed your story after having talked to the defendant about the particulars of this case?" And under oath, she said that she had changed her story after talking to [petitioner] Voelker."
(RT 1319.)

The prosecutor essentially argued that Raven Oliver was suddenly lying and that there was no phone records corroborating Oliver's "new" version of events. The prosecutor's argument distorted the factual landscape by making it appear that petitioner had unduly influenced Raven Oliver into changing her story, thereby diverting the fact finder from assessing Oliver's testimony to alternatively deciding that petitioner was guilty because he had manipulated Oliver into lying to the jury. A

1 reasonably competent attorney would have restored Oliver's credibility by simply validating her
2 testimony with the certified phone records.⁸

3 Trial counsel's failure to obtain the phone records that would have counteracted the false
4 impeachment of Oliver was ineffective and highly prejudicial. The 9th Circuit has found similar
5 omissions of corroborative evidence to constitute deficient, and prejudicial, performance by counsel.
6

7 In Hart v. Gomez, supra, 174 F.3d 1067, James Thomas Hart was convicted of molesting his
8 daughter during visits to a camping resort. His daughter had testified that "Hart *never* molested her
9 during visits on which he was accompanied by another adult." Id. at 1067. Hart's girlfriend testified
10 at trial that she had been with him during all of the trips alleged in the information, and had witnessed
11 no molestation. See Id. Hart's trial counsel, however, did not introduce grocery receipts and the
12 girlfriend's personal calendars, which would have corroborated her testimony that she was present
13 during all of the trips and, thereby, "demonstrate[d] [Hart's] factual innocence[.]" Id. at 1070. The 9th
14 Circuit concluded that "[the girlfriend's] evidence, if believed by the jury, would have demonstrated
15 the truthfulness of her testimony and established that ... no molestation occurred during the time
16 period set forth in the information—or at least that the molestation as charged in the information
17 had not been proved beyond a reasonable doubt." Id.

18 As in Hart, petitioner's trial attorney had at his fingertips evidence that would have
19 corroborated a key defense witness whom the jury might otherwise not believe, yet failed to secure
20 this evidence and use it at trial. By failing to introduce into evidence the material phone records,
21

22
23 8 Oliver previously had reported to a D.A. Investigator that the phone calls occurred around
24 11:30–12:00 in the morning. However, Oliver later explained that, after talking with petitioner,
25 and *reviewing her phonebill*, she realized that the calls had in fact occurred much later. (See RT
1072-1074; see also Exhibit G [Oliver's phone records].) However, the D.A. told the jury that the
phone records didn't exist, and insinuated that Oliver only changed her story after speaking with
petitioner.

1 Wall allowed the prosecution to falsely impeach Raven Oliver, a witness who was factually telling
 2 the truth. Wall's prejudicial actions undermine confidence in the outcome of this trial, particularly in
 3 light of the prosecutor's inaccurate arguments.⁹

4 In the end, this case paints a picture of prejudice beyond the example announced in Hart
 5 because the jury took the additional step—the additional step of requesting to see the telephone
 6 records that would prove whether or not petitioner was in fact on the phone with Oliver. Apparently
 7 the jury wanted to resolve their lack of conviction. Unfortunately, though, the jury's request to see
 8 the records was denied by the trial judge who gave the false impression that no such records existed.
 9

10 Given the defense in this case, trial counsel should have, at the least, obtained the phone
 11 records for his client's defense—certainly when a lawyer makes a sound strategic choice to present
 12 a defense, he must provide his client's jury with factual support for that defense. (See U.S. v. Tucker,
 13 supra, 716 F.2d 576, 594 (9th Cir.) ["a reasonably competent lawyer must ... provide factual support
 14 for [the] defense where such corroboration is available"]; accord, Alcala v. Woodford, (9th Cir. 2003)
 15 334 F.3d 862, 870-873.)

16 Wall's sworn declaration concedes that the telephone records dovetailed with his strategy and
 17 would be "necessary for my client's defense." (See Exhibit H, trial counsel, Jim Wall declaration, ¶ 1-
 18 4. ["I concluded that a telephone call by my client to Raven Oliver on the night in question would be
 19

20
 21 ⁹ See e.g., RT 1268, where the prosecutor argues to the jury that "the defendant ... was never
 22 using the phone in that house" and that the defendant "was always present during the entire
 23 time that this beating was going on." See also RT 1319, where the prosecutor tells the jury
 24 that "there is absolutely no certified record or attested to phone bill that will tell you that the
 25 phone call was actually made." See also RT 1325, where the prosecutor wrongly discredits
 Oliver and tells the jury that "DiPrima told you that when he jumped off that balcony, the
 defendant was still present in that apartment. It makes no sense to believe that he was
 supposedly on the phone with his girlfriend ... it makes no sense to believe that he was
 actually on the phone...."

1 exculpatory evidence for my client ... [and] necessary for my client's defense.... Several times during
2 trial, I looked for the subpoenaed records, but they did not arrive. I did not seek a continuance or
3 check on their status"]. Cf., Tucker v. Prelesnik, 181 F.3d 747, [holding that trial counsel's "failure to
4 request a continuance, combined with his failure to obtain ... records casting serious doubt on the
5 reliability of the testimony of the prosecution's sole witness ... was an error so serious as to have
6 deprived [petitioner] of a fair trial as guaranteed by the Sixth Amendment].

7
8 The certified records would have further shown that petitioner was on the phone at 2:24
9 a.m.—That is, during the first few minutes of entering the apartment. This is a fact that would
10 have proven it incredible for petitioner to ambush DiPrima within the first few minutes of entering
11 the apartment. Videotape from a 7-11 convenience store near the apartment established that DiPrima
12 and petitioner were in the store together at 2:15 a.m. (People's Exh. 34: RT 609.) Also, referring to
13 another of the video clips that were introduced into evidence, defense counsel in closing argument
14 said DiPrima and petitioner left the store at 2:17 a.m. (RT 1303.) DiPrima estimated that the trip
15 from 7-Eleven to the apartment took about 3-4 minutes. (RT 277.) This timeline illustrates that
16 DiPrima and petitioner made it to petitioner's apartment complex at about 2:22 a.m., give or take a
17 minute or so. **Simply stated**, If petitioner were on the phone with Oliver at 2:24 a.m. it proves that
18 he couldn't be attacking DiPrima at this time. Defense counsel Wall knew this fact was absolutely
19 crucial to the defense, indeed, *he told the jury in his opening statement that this proof would be*
20 *forthcoming*. (RT 223.) However, defense counsel prejudicially abandoned this part of his opening
21 statement due to his negligent failure to properly obtain the phone records for trial.¹⁰
22

23
24
25 10 Numerous courts have held that when defense counsel tells the jury in the opening statement
that certain proof will be forthcoming and then fails to deliver it, ineffectiveness has been shown. See
e.g., Hart v. Davenport, 478 F.2d 20 (3rd Cir. 1973); People v. Corona, 80 Cal.App.3d 684 (1st Dist.
1978).

1 (5). Conclusion

2 Trial counsel made a sound strategic choice to present a viable defense, but nonetheless failed
3 in his duty to present that defense reasonably and competently. Consequently, counsel's admitted
4 omissions and failures prejudiced petitioner's defense. Counsel *never* subpoenaed petitioner's home
5 phone records and he *failed to lay a proper foundation* for the introduction of the phone records that
6 would have corroborated a key defense witness whom the jury would otherwise not believe, i.e., ex-
7 girlfriend, Raven Oliver. In that such steps, if taken, could have, at the least, created reasonable
8 doubt in the minds of the jury. This ineptitude was exacerbated when the prosecutor told the jury that
9 the phone records did not exist—defense counsel's argument appeared to be in fact false—the
10 jury asked for, but were denied the phone records. Consequently, defense counsel's "bark with no
11 bite" and "faith with no proof" tactics severely undercut petitioner's whole case. Counsel's admitted
12 failures were prejudicial and they resulted in the violation of petitioner's right to present a defense and
13 his constitutional right to the effective assistance of counsel. But for attorney Wall's errors, there is a
14 reasonable probability of a different outcome. For these reasons, and respectfully directing this
15 Honorable Court specifically to the principles utilized in Hart v. Gomez, supra, 174 F.3d 1067, and
16 Strickland v. Washington, supra, 466 U.S. 668, petitioner prays that this Honorable Court order an
17 evidentiary hearing and issue the Writ.
18

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1 **GROUND THREE:** CALIFORNIA HAS VIOLATED PETITIONER'S
 2 CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FUNDAMENTAL FAIRNESS
 3 BECAUSE IT HAS ARBITRARILY REFUSED TO CONSIDER NEWLY DISCOVERED
 4 WITNESSES WHO IMPEACH THE PROSECUTION'S SOLE PERCIPIENT WITNESS
 5 AND PROVIDE EXCULPATORY EVIDENCE FOR PETITIONER.

6 (1). **Introduction**

7 The Supreme Court has explained that "newly discovered evidence relevant to the guilt of a
 8 state prisoner is not a ground for relief on federal habeas corpus." Townsend v. Sain (1963) 372 U.S.
 9 293 ["where newly discovered evidence is alleged in a habeas application, evidence which could not
 10 reasonably be presented to the state trier of facts, the federal court must grant an evidentiary hearing.
 11 Of course, such evidence must bear upon the constitutionality of the applicant's detention; the
 12 existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground
 13 for relief on federal habeas corpus. Also, the district judge is under no obligation to grant a hearing
 14 upon a frivolous or incredible allegation of newly discovered evidence."], overruled on other grounds
 15 by Keeney v. Tamayo-Reyes (1992) 504 U.S. 1; accord, Herrera v. Collins (1993) 506 U.S. 390, 400.
 16 "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not
 17 imprisoned in violation of the Constitution—not to correct errors of fact." Herrera at p. 400 [citing
 18 cases]; see also Id. at 404-405 [noting that the fundamental miscarriage of justice exception has never
 19 been extended to "freestanding claims of actual innocence."]

20 Based on petitioner's review of the case law, it does not appear that the Supreme Court has
 21 ever held that newly discovered evidence in and of itself implicates the constitution. In Herrera, the
 22 petitioner presented what he believed to be newly discovered evidence of his actual innocence—an
 23 affidavit by another individual stating that he, not Herrera, had committed the murder for which
 24 Herrera had been convicted and sentenced to death. In rejecting the petitioner's claim, the Supreme
 25 Court noted that "[c]laims of actual innocence based on newly discovered evidence have never been

1 held to state a ground for federal habeas relief absent an *independent constitutional violation*
2 occurring in the course of the underlying state criminal proceeding." Id. (emphasis added). The
3 Supreme Court determined that Herrera had not established that any constitutional violations had
4 occurred at his trial.

5 At the core of the Supreme Court's discussion in Herrera was the principle that habeas relief is
6 available only to remedy violations of federal constitutional law; the due process clause guarantees
7 only a procedurally fair trial and not that the verdict will be factually "correct." See Id. at 401-402.
8 The Supreme Court pointed to constitutional sufficiency-of-the-evidence review and noted that the
9 requirement was only that the record contained sufficient evidence, viewed in the light most
10 favorably to the prosecution, to justify a rational juror in finding the defendant guilty beyond a
11 reasonable doubt. Id. (Citing Jackson v. Virginia (1979) 443 U.S. 307.)

13 Herrera v. Collins dealt with a claim of actual innocence; the new evidence was an affidavit
14 submitted by another individual taking responsibility for the petitioner's crime. The present case
15 involves a claim that a newly discovered eyewitness observed petitioner coming to the aid of the
16 victim, and a separate witness (also newly discovered) was personally informed by the victim that
17 petitioner had no role in the crimes. Notwithstanding those differences, Herrera appears to be the
18 Supreme Court precedent most apposite to the present case. With Herrera in mind, petitioner next
19 proceeds to the merits of his newly discovered evidence claim.

21 In California a defendant is entitled to a new trial when new evidence is discovered that would
22 probably result in a different result on a retrial. (Penal Code 1181(8).) California courts have
23 analyzed this language as creating a five-part requirement—that is:

24 "[A] new trial will be granted if: (1) the evidence is newly
25 discovered; (2) the evidence is not cumulative; (3) the evidence is
'such as to render a different result probable on a retrial of the
cause;' (4) 'the party could not with reasonable diligence have

1 discovered and produced it at the trial;' and (5) that the 'facts be
2 shown by the best evidence of which the case admits.'" (Earp v.
3 Ornoski (9th Cir. 2005) 431 F.3d 1158, 1171 fn. 10; citing People
4 v. Martinez (1984) 36 Cal.3d 816.

5 In cases where a counsel's lack of diligence in securing the attendance of a necessary witness
6 at the trial is the only requirement not met, and the prosecution's case is not strong, California courts
7 make an exception and grant a new trial. Martinez, supra, citing to People v. Williams (1962) 57
8 Cal.2d 263, 272-275. Certainly a defendant should not remain convicted only because of his
9 attorney's lack of diligence if new evidence would exonerate him. The lack of diligence could also
10 constitute ineffective assistance of counsel in any case. Martinez, supra, at 825-826.

11 Briefly, as stated in the previous sections of this petition, the prosecution's case was based
12 upon the premise that Petitioner Voelker was involved and participated in the robbery and beating of
13 DiPrima. The defense, on the other hand, attempted to show that petitioner was initially unaware that
14 the two black males attacked DiPrima over his use of the "n" word. The defense asserted that
15 petitioner was in the other room talking on the phone and not involved when the physical
16 confrontation erupted. The evidence in the trial centered on the roles of the two black men and that of
17 petitioner.

18 After the jury came back with its guilty verdict, the trial court appointed petitioner a new
19 attorney who discovered two new witnesses who possessed exonerating evidence.¹¹

20
21
22
23 11 The Marin County Superior Court appointed Attorney Mary Stearns to represent petitioner on
24 a motion for new trial (§ 1181) because the original trial attorney, James Wall, had a
25 legitimate conflict in arguing that his failure to secure material phone records prejudiced
petitioner's defense. (See infra II.) Ms. Stearns immediately subpoenaed the phone records,
hired an investigator, found witnesses, and expanded the motion beyond the claim of
ineffective assistance.

1 (2). Karlan Brooks

2 The first witness was an eyewitness, Mr. Karlan Brooks, who lived below petitioner. This
3 person was not on any witness list for the prosecution or the defense. His statements are newly
4 discovered.

5 His testimony would not be cumulative. (See Exhibit I [Karlan Brooks interview].) In
6 essence, Mr. Brooks stated that he lived in apartment 106 of the apartment complex where the
7 incident occurred. On the night of the incident he heard "a lot of noise coming from right above us.
8 It went on for about 20 minutes. We could hear voices and it sounded like some fighting." After
9 listening to the noise Brooks and his girlfriend got up to look out their balcony, they saw a body go
10 flying by and land in the yard next door. The person who flew by lay there for a minute and then
11 called out "call an ambulance, I'm hurt." Then Brooks saw petitioner jump over a wall and run up to
12 the person who had fallen/jumped from above. Petitioner said, "Are you okay? Do you need an
13 ambulance?" The person lying on the ground got up and ran away. No one testified to these events
14 at the trial.

15
16 This testimony contradicts the victim's trial testimony and contradicts the prosecution's theme
17 and character assassination of Petitioner Voelker. First, Brooks' statement suggests that there was an
18 argument/fighting for some 20 minutes. It is a reasonable inference that everyone went to petitioner's
19 apartment to party, that the victim said the "n" word there, that the arguments broke out and that then,
20 the fighting started. The new witness' testimony more importantly demonstrates that petitioner was
21 concerned about the victim—he asked if the victim was hurt and asked if he should call an
22 ambulance. A reasonable interpretation of these facts would be that petitioner had been on the phone
23 with his ex-girlfriend when things got out of hand and got physical, and that he came into the living
24 room right before the victim jumped from the balcony. When the victim jumped, petitioner ran out to
25

1 see if he needed help. Certainly, petitioner's question, "are you hurt? Do you need an ambulance?" is
2 not something that a robber or attacker would ask to his victim. The testimony at the very least
3 provides reasonable doubt as to petitioner's role. And with the sketchy testimony of the victim, it is
4 likely that this type of evidence would affect the verdict rendered.

5 It should be noted that Michael Kollin (the independent party that called 911) corroborates
6 Brooks' testimony. Kollin, a resident in the apartment building, reported to officers that on the
7 night/morning of the incident he looked outside and saw that "one subject [was] helping the other."
8 (RT 954-959; CT 221.) The victim told the jury that he didn't know who this person was that had
9 helped him and he did not think that it was the petitioner. (RT 562-563.) However, DiPrima
10 previously told detectives that the petitioner was the person that he encountered after jumping off of
11 the deck. (RT 1111-1112.) Noticeably, there was conflicting evidence on this issue. That is why the
12 discovery of Brooks was tremendously significant—he added the missing piece to this part of the
13 puzzle by not only impeaching the prosecution's only percipient witness, but also confirming that
14 petitioner was indeed trying to help the victim. That Brooks' testimony would contradict the victim's
15 sketchy testimony and the prosecution's theory demonstrates its great relevance.

16
17 **(3). Zeph Carter**

18 The second witness that the defense found was Zeph Carter, who would have testified that the
19 victim told him that the two black males were the ones that did the beating and attack and that
20 petitioner did not participate or assist. Neither the defense nor the prosecution had this evidence at
21 the time of the trial. The evidence is newly discovered. Carter's testimony will impeach the victim
22 and will provide exculpatory evidence for petitioner. In trial, the victim testified that he could not
23 remember much of what happened during his brutal beating. The black men are the ones that got
24 upset about the "n" word—they hit him in the face, whipped him with a belt, took his personal
25

property, hit him in the head with a Dura Flame log and yelled at him to give up his credit cards, etc. The victim said he only saw petitioner *once* during the assault and robbery when he looked up at someone holding him in the midst of this chaotic and frightening scene. As noted in the "statement of the facts" portion of this petition, petitioner is one of the people that the victim spent the most time with that night and petitioner's face would stick out in the victim's memory for that reason alone. If the victim spoke to Zeph Carter near the time of the incident and specifically said that petitioner did not do anything, there is a reasonable probability that that testimony would affect the verdict. The evidence would be admissible at trial as an inconsistent statement. Other than the victim telling the police that he did not remember petitioner doing anything, and telling the jury that he did not know if the petitioner had hit him, the victim's statements as to such a friend would be the next best evidence.

(4). **The state courts' denied petitioner an evidentiary hearing in which petitioner would have presented the new witnesses.**

The state courts did not give petitioner an opportunity to present these two witnesses' statements, even though petitioner timely presented his motion.

The United States Constitution, pursuant to the Fifth and Fourteenth Amendments, guarantees a criminal defendant due process of law. Regarding due process in general, the Court in Chambers v. State of Florida (1940) 309 U.S. 227, 236-237 stated:

"[A]s assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement... that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

Due process is not rigid and unbending but "... is a flexible concept that varies with the particular situation." (Zinermon v. Burch (1990) 494 U.S. 113, 127; accord, Morrissey v. Brewer (1972) 408 U.S. 471, 481 ["... due process is flexible and calls for such procedural protections as the particular situation demands... Whether any procedural protections are due depends on the extent to

1 which an individual will be condemned to suffer grievous loss."") Here, petitioner has been
2 condemned to suffer grievous loss of liberty, i.e., many years in prison for a crime that he did not
3 commit. Under the facts of this case, the demands of due process mandated the state courts to
4 consider the new witnesses' testimony.

5 In People v. Hairgrove, (1976) 18 Cal.App.3d 606, 610, the defendant's motion was based
6 upon a third parties affidavit but was denied without the trial court taking the affiant's testimony at the
7 hearing. Because the affiant did not testify at the trial, the court of appeal held that the trial judge
8 abused his discretion in not taking all relevant evidence on the motion prior to denying it. However,
9 in reversing, the court expressed no opinion as to the merits of the defendant's motion. (Id. at p. 610.)
10 In Earp v. Ornoski, supra, 431 F.3d 1158, the Ninth Circuit held that an evidentiary hearing was
11 required in order to determine whether, due to government interference, the petitioner in that case was
12 precluded "from presenting a witness in support of his motion for new trial."

14 Hairgrove and Earp both addressed the issue of due process—the defendant's ability to fully
15 present his new evidence. In both cases it was not the merits of the trial court's decision that was at
16 issue, but rather the procedures used to reach that decision. In the present case the trial court never
17 even sought to allow petitioner to have an evidentiary hearing in which petitioner would be permitted
18 to produce these witnesses' testimony. Indeed, at the motion for new trial, Brooks was present in the
19 courthouse (in the custody of the Sheriff), and prepared to testify, but the court declined to hear from
20 him.

22 In the case of Zeph Carter, the defense knew his whereabouts, but we were unable to elicit his
23 exculpatory testimony at the hearing due to the fact that he was in a court mandated drug treatment
24 program. Even with a subpoena, the defense's efforts to secure Carter proved useless. The defense
25 asked the court for a reasonable continuance and/or to bifurcate the hearing. (RT 1350-1356; See

1 also RT 1350 [defense counsel: Mr. Carter isn't here, so I would ask the court at least to bifurcate this
 2 hearing so that I can try and get him here..."]. The court, however, refused to grant a continuance.
 3 (See RT 1356 [Trial Judge: "I am not going to continue the hearing on a motion for new trial so that
 4 Mr. Carter, who still hasn't been served, and who has been elusive at best, can come in and testify"].¹²

5 California law does provide that a reasonable continuance may be granted to procure the
 6 affidavits of the witness by whom the evidence is to be given, and, if the showing is sufficient, it is
 7 error to refuse it. (People v. Gaines, (1961) 192 Cal.2d 128, 135.) Here, Carter was confined in a
 8 court mandated drug treatment program by the government. Petitioner cannot imagine a showing on
 9 a request for continuance more sufficient.
 10

11 If the court would have allowed petitioner to present Carter and Brooks' testimony it would
 12 have established that there was substantial merit to petitioner's motion or that their testimony would
 13 have not affected the outcome of the trial. Either outcome would have contributed positively to the
 14 administration of justice. Even if their testimony had turned out to be inclusive, at least the court
 15 would have all available information before it in ruling on the motion for new trial. Surely few rights
 16 are more fundamental than "that of an accused to present witnesses in his own defense." (Chambers
 17 v. Mississippi, 410 US 284, 302 (1973).) Indeed, defendants have a due process right to compel
 18 attendance of relevant witnesses so that they may be treated with "that fundamental fairness essential
 19

20
 21 12 What's intriguing is that Carter later testified before the same court in a subsequent trial that
 22 incriminated one of the black males. (See the case of People v. Harvey, Marin County Case
 23 No. SC13284A.) Carter's appearance at the Harvey trial produces a perceivable violation of
 24 petitioner's constitutional rights. Surely if the court allows the Marin County District
 25 Attorney's office to use Carter's testimony to incriminate one of the black males, but disallows
 petitioner's defense the opportunity to utilize the same witness' testimony to vindicate him,
 that's a violation of the equal protection clause of the Fourteenth Amendment and the due
 process clause of that Amendment. Furthermore, it adds to the weight of petitioner's
 argument that the court failed to fulfill petitioner's right to present relevant exculpatory
 witnesses in an evidentiary hearing. (See Exhibit J, [Declaration of Harvey], ¶ 1-4.)

1 to the very concept of justice." (United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982).)
 2 Here, the state courts were unable to make credibility determinations because petitioner was unable to
 3 compel attendance of relevant witnesses.

4 By shrouding Carter in a treatment facility, the interference element required to establish a
 5 violation of compulsory process has been met. (See United States v. Valenzuela-Bernal, *supra*, 458
 6 U.S. 858.) Indeed, the government's holding of Carter caused an inability to present him as a defense
 7 witness; thus, petitioner's defense was unable to subpoena him for the hearing or conduct a proper
 8 interview. Yet, the Marin County District Attorney's Office, who held the keys to Carter, had no
 9 difficulty in securing him as a prosecution witness before the same court in a subsequent trial that
 10 incriminated petitioner's alleged "cohort." (See People v. Harvey, Marin County Superior Court No.
 11 SC132841A; see also Exhibit K [Tristan Harvey declaration] ¶ 1-3 attached hereto and incorporated
 12 herein by reference as though set forth in full.)
 13

14 **(5). Trial Counsel's failure to investigate denied petitioner's right**
 15 **to present readily available exculpatory witnesses.**

16 As noted, the California standard for granting a new trial is what guides a federal court's
 17 prejudice analysis. Earp v. Ornoski, *supra*, (9th Cir. 2005) 431 F.3d 1158, 1171, fn. 10 ["Because this
 18 is a state conviction the California standard for granting a new trial must guide our prejudice
 19 analysis"]. Pursuant to People v. Martinez, *supra*, (1984) 36 Cal.3d 816, 825, if the newly discovered
 20 evidence would make a different result probable on retrial, a defendant's attorney's lack of diligence is
 21 not enough to deny a motion for new trial.

22 If this Court were to find that trial counsel's lack of diligence waived petitioner's argument
 23 that he was precluded from presenting newly discovered witnesses, then petitioner would ask that this
 24 Court reach the merits of the issue based on a finding that counsel's failure to investigate denied
 25 petitioner his Sixth Amendment right to the assistance of competent counsel. Had counsel been

armed with this additional evidence, it is more than reasonably probable a better result would have occurred absent counsel's omissions. See also Exhibit J, [Declaration of Mike Williams] ¶ 1-5, attached hereto and incorporated herein by reference, [Trial counsel *never* asked defense investigator to discover possible witnesses at the location of the incident!].¹³

(6). **Conclusion**

This Court should hear the testimony from Zeph Carter and Karlan Brooks before making a final decision in this case. Both witnesses possess exonerating evidence that contradicts the prosecution's theme and their main witness' story. In such a close case with such dire consequences, this Court should grant an evidentiary hearing on this issue.

GROUND FOUR: THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR WHEN IT FAILED TO INSTRUCT ON THE SPECIFIC INTENT ELEMENT REQUIRED FOR PETITIONER TO BE FOUND GUILTY OF AIDING AND ABETTING.

(1). **Introduction**

As a preliminary matter, it should be noted that the state courts "rubber stamped" this federal constitutional claim without providing a basis for their decision, therefore, the state court decision does "not warrant the deference [this Court] might usually apply." (Delgado v. Lewis (9th Cir. 2000) 223 F.3d 976, 982.) Lacking a reasoned decision from the state court, this Court should consider the claim under an independent standard of review rather than the more deferential standard. See also Lewis v. Mayle (9th Cir. 2004) 391 F.3d 989, 996 [standard of review applicable to claim state court did not reach on the merits].

¹³ Counsel's lack of diligence in investigating witnesses was not isolated to this incident alone. Counsel also exhibited a lack of diligence when he failed to investigate several witnesses on his own witness list. See e.g., RT 442-443, where counsel admits that he was "relying on the information from the District Attorney's investigator to do [his] cross-examination and direct."

In this case, the jury was instructed on two theories for finding petitioner guilty of the charged offenses: that he was liable as a direct perpetrator or, in the alternative, that he was liable as an aider and abettor. However, no instructions defining aiding and abetting (such as CALJIC No. 3.01) were given. Thus, the jury never properly considered whether petitioner had the specific intent necessary to be convicted as an aider and abettor. As a result of the court's failure to properly instruct the jury on the theory of aiding and abetting, petitioner's rights to due process, a fair trial, and fundamental fairness under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were prejudicially violated. Reversal of the conviction is necessary.

(2). **Standard of Review**

The standard of review for instructional error was stated in Estelle v. McGuire (1991) 502 U.S. 62, 67:

"The only question for us is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process' ... It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record. [Citation.]"

Applying the above standard, reversal is required.

(3). **The trial court committed prejudicial error by failing to instruct the jury on the specific intent element required for petitioner to be found guilty of aiding and abetting.**

California Penal Code section 31 (the aider and abettor or co-conspirator statute) states, in pertinent part, that:

All persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, ... are principals in any crime so committed.

1 In the case of People v. Beeman (1984) 35 Cal.3d 547, the California Supreme Court held that
 2 a "person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the
 3 unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or
 4 facilitating the commission of the offense, (3) by act or advise aids, promotes, encourages or
 5 instigates, the commission of the crime." Id. at 561. See also People v. Marshall (1997) 15 Cal.4th 1,
 6 40.

7
 8 Regarding the aiding and abetting instructions, petitioner's jury was instructed pursuant to
 9 CALJIC numbers 3.00, 3.03 and 4.51, that:

10 Persons who are involved in committing a crime are referred to as
 11 principals in that crime. Each principal, regardless of the extent or
 12 manner of participation is equally guilty. Principals include: 1.
 13 Those who directly and actively commit the act constituting the
 14 crime, or 2. Those who aid and abet the commission of the crime.
 15 (CALJIC No. 3.00; CT 342.)

16 Before the commission of the crimes charged in count 1, 2 + 3, an
 17 aider and abettor may withdraw from participation in those crimes,
 18 and thus avoid responsibility for those crimes by doing two things:
 19 First, he must notify the other principles known to him of his
 20 intention to withdraw from the commission of those crimes;
 21 second, he must do everything in his power to prevent its
 22 commission. (CALJIC No. 3.03; CT 343.)

23 If the evidence establishes beyond a reasonable doubt that the
 24 defendant aided and abetted the commission of the crime charged
 25 in this case, the fact, if it is a fact that he was not present at the time
 and place of the commission of the alleged crime for which he is
 being tried does not matter and does not, in and of itself, entitle the
 defendant to an acquittal. (CALJIC No. 4.51; CT 344.)

26 It is well established that trial courts are required to accurately and completely instruct jurors
 27 as to the elements of charged offenses. United States v. Gaudin (1995) 515 U.S. 506, 522-523 [the
 28 Sixth Amendment to the federal constitution "gives a criminal defendant the right to have a jury

1 determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is
2 charged"].

3 Under section 31, a jury must find that the defendant had the specific intent required of aiding
4 and abetting. None of the above instructions comply with this requirement; they do not define aiding
5 and abetting. This was error pursuant to People v. Beeman, supra, (1984) 35 Cal.3d 547 [an
6 instruction that did not correctly inform the jury about the specific intent required to be guilty of
7 aiding and abetting was reversible error. Id. at 561]; accord, Roy v. Gomez (9th Cir. 1996) 81 F.3d
8 863, 866, revd. on other grounds sub. nom. California v. Roy (1996) 519 U.S. 2; see also Martinez v.
9 Borg (9th Cir. 1991) 937 F.2d 422, 223.

10
11 In this case, the alternative aiding and abetting instructions were given with regards to all of
12 the charged offenses. The prosecutor's argument further demonstrates that the jury had two theories in
13 which they could choose from:

14 "[T]he Judge has already instructed you on what the elements and
15 charges are, and this is a violation of Penal Code section 211, and
16 we've charged this as a first degree robbery, and one of the reasons
17 we've charged it as a first degree robbery is because this robbery
18 took place -- and the term, "acting in concert," meaning two or
19 more persons acting together in a group, and *that includes not only*
those who personally engaged in the act or acts constituting the
crime, but also those who aided and abetted a person
accomplishing it. (RT 1280; italics added.)

20 As instructed, the jury could have found petitioner guilty of each of the charges on either an
21 aiding and abetting theory, or for directly committing the offenses. However, because the verdict
22 forms did not specify whether petitioner was guilty as a principal or as an aider and abettor, it is
23 impossible to know from the verdicts themselves upon which theory the jury relied.

24 By eliminating the need for a jury finding on the required elements of the aiding and abetting
25 allegation, the instructions given by the trial court misstated the law and were therefore erroneous.

1 When a jury is instructed on alternate theories, one of which is legally inadequate, reversal is required
 2 unless the record reflects that the jury's finding was not based on the legally invalid theory. (Boyde v.
 3 California (1990) 494 U.S. 370, 379-380.) Under this rule, the convictions must be reversed unless
 4 the prosecution can establish that no juror relied upon the improper theory. (Sandstrom v. Montana
 5 (1979) 442 U.S. 510; Burks v. United States, 47 U.S. 1 (1978).) No such finding is possible here
 6 because the prosecutor relied heavily on the erroneous instructions during her closing argument—
 7 she argued the actions of "Bob Marley" and the other assailant (not petitioner), "We have a stomp to
 8 the head, we have a ... whack against the victims head with a Duracell log (sic), we have him being
 9 whipped repetitively with a belt" (RT 1325), and urged the jury to base its finding of guilt on the
 10 erroneous instructions.
 11

12 There is nothing in the record before this Court that indicates that the jury's true finding was
 13 not based on the erroneous aiding and abetting instructions. The record shows that the black men are
 14 the ones that hit DiPrima in the face, whipped him with the belt, took his personal property, hit him in
 15 the head with the fire log and yelled at him to give up his credit cards, etc. Nowhere in the record
 16 does it show that petitioner took anything from the victim. As it can not be demonstrated that the jury
 17 surely did not rely on the erroneous instructions, the conviction must be reversed. See Keating v.
 18 Hood 191 F.3d 1053, 1062, ["We have consistently interpreted Supreme Court precedent to require
 19 reversal in any case in which a verdict may have rested on a legally invalid ground."] ¹⁴
 20

21 ///

22 ///

23 //

24
 25 ¹⁴ In this case the state appropriately requested that an instruction defining aiding and abetting be
 given to the jury. (CT 299; CALJIC No. 3.01.) However, for whatever reason, the proposed
 instruction was never given to the jury.

(4). **The Error was Prejudicial Under the Brecht Standard.**

As the jury may have relied on the legally incorrect aiding and abetting theory, this issue falls squarely under Boyde v. California (1990) 494 U.S. 370, 379-380, and should be reversed per se. However, should this Honorable Court disagree, the error was prejudicial under the Brecht federal standard, and requires reversal. (See California v. Roy (1996) 519 U.S. 2 [holding that California's Beeman error is subject to Brecht v. Abrahamson 507 U.S. 619, 637, standard of review]; also see Scalia, J., concurring opinion [a federal habeas court should grant relief for this sort of claim when a petitioner has had "no opportunity to litigate it before, or when there is substantial doubt, on the facts, whether the defendant was guilty"].)¹⁵

The aiding and abetting instructions, as given here, allowed petitioner's jury to find him guilty of the crimes (1) without finding that he had knowledge of the unlawful purpose of the perpetrators and (2) without determining, even if he did, that he had the specific intent or purpose of committing, encouraging, or facilitating the commission of the crime. Indeed, there are no findings by the jury that demonstrate that the jury found that petitioner had the intent to facilitate the robbery on the victim. The jury could have found that petitioner did not know what the two black males were doing, or that petitioner merely had the intent to allow the blacks to scare the victim, or that petitioner changed his mind in the middle of the incident, or for any reason lacked the requisite intent. Perhaps the jury simply ignored petitioner's intent altogether, which is precisely the danger of Beeman error.

The Sixth Amendment to the federal constitution "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." (United States v. Gaudin, supra, (1995) 515 U.S. 506, 522-523.) The jury's "constitutional

¹⁵ Petitioner asserts that this case presents a novel situation in which both prongs of the California v. Roy concurring opinion are satisfied in this case—Petitioner has never previously been afforded the opportunity to litigate this issue; and petitioner is actually innocent of the crimes in this case.

1 responsibility," the high court said in Gaudin, includes the existence of each element of the crime—
2 —"that is [the] 'ultimate' or 'elemental' fact[s]" needed to convict. (Id. at pp. 514-515.) No matter
3 how inescapable a defendant's guilt of an element may seem in light of the evidence presented, the
4 judge must have the jury make the ultimate finding on each element of the crime charged. Here,
5 however, the trial court's aiding and abetting instructions precluded the jury from independently
6 determining one element of the charged offense: *Intent*.

7
8 As the United States Supreme Court has pointed out in the past, to determine whether an error
9 "contributed to" a verdict, a reviewing court does not ask whether a hypothetical jury in a
10 hypothetical trial in which the error did not occur would surely have reached the same verdict.
11 (Sullivan v. Louisiana (1993) 508 U.S. 275, 277-279.) Rather, the reviewing court must ask whether
12 the guilty verdict actually rendered in this trial was "surely unattributable to the error." (Ibid.) This is
13 because the Sixth Amendment right to a jury trial means that the jury, and not a reviewing court, must
14 find beyond a reasonable doubt every fact needed to convict. This is the test that United States
15 Supreme Court Justice Antonin Scalia articulated in his concurring opinion in Carella v. California
16 (1989) 491 U.S. 263, 267, which the entire nine-member court later adopted in Sullivan v. Louisiana
17 (1993) 508 U.S. 275.

18 "The constitutional right to a jury trial embodies 'a profound judgment about the way in which
19 law should be enforced and justice administered.' Duncan v. Louisiana 391 U.S. 145, 155 (1968). It is
20 a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power—a
21 reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group
22 of judges.' Id., at 156. A defendant may assuredly insist upon observance of this guarantee even when
23 the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is
24 why the Court has found it constitutionally impermissible for a judge to direct a verdict for the state."
25

1 (Carella v. California, supra, 491 U.S. 263, 268 (conc. opn. of Scalia, J.)) No matter how
2 overwhelming the evidence may be in any given case, the defendant has the right to have a jury and
3 not the judge determine every element of the charged offense.

4 Here, the trial court improperly removed from the jury's consideration the element of criminal
5 intent. The instant Beeman error is subject to the test of Brecht, which requires reversal for federal
6 constitutional error that has a "substantial and injurious effect." (Ibid.) Here, the error was
7 substantial and injurious because, without the proper definition of aiding and abetting, CALJIC No.
8 4.51 (one of the several aiding and abetting instructions given) prejudicially extracted petitioner's
9 entire defense. As noted, petitioner's defense was that he was present in the other room at the time of
10 the assault, however, when he discovered what was happening he attempted to come to the aid of the
11 victim. The instruction (CALJIC No. 4.51) informed the jury that petitioner's "presen[ce] at the time
12 and place of the commission of the crime for which he is being tried does not matter and does not, in
13 and of itself, entitle the defendant to an acquittal. (CT 344.) Consequently, even if the jury believed
14 petitioner's defense (that he was talking on the phone in the other room at the time of the assault) they
15 may have mistakenly believed that petitioner had not met his burden of proving that he was not an
16 aider and abettor. **Simply stated**, without the proper definition of aiding and abetting, CALJIC No.
17 4.51 had the effect of shifting the burden of proof to petitioner. This is not acceptable. The Supreme
18 Court has held that the prosecution cannot shift the burden of proof or persuasion as to any element of
19 a crime to the defendants. (Sandstrom v. Montana (1979) 442 U.S. 510.) By instructing the jury that
20 petitioner's presence at the time and place of the crime "...does not matter and does not, in and of
21 itself, entitle the defendant to an acquittal," the trial court in effect shifted the burden to petitioner to
22 prove that he was not an aider and abettor in order for petitioner to retain any right to his defense.
23
24
25

1 (5). Conclusion

2 As a matter of law, the trial court committed prejudicial error of constitutional magnitude
3 when it instructed the jury on an aiding and abetting theory without informing the jury that they had
4 to find that petitioner shared the intent to commit, encourage, or facilitate the crimes that took place
5 in petitioner's apartment. Unlike any other case that petitioner has found, this case presents an
6 unusual situation in which petitioner has had "no opportunity to litigate [this claim] before"
7 (California v. Roy 519 U.S. 2, 8, Scalia, J.); therefore, the federal writ should issue.
8

9 **GROUND FIVE: CUMULATIVELY, THE ERRORS IN THIS CASE PREJUDICED**
10 **PETITIONER'S RIGHTS TO DUE PROCESS, A FAIR TRIAL AND EFFECTIVE**
11 **ASSISTANCE OF COUNSEL SUCH THAT REVERSAL OF THE CONVICTION IS**
COMPELLED.

12 (1). Introduction

13 Similar to the claim in the previous section, the state courts never considered whether the
14 cumulative effect of all the trial errors denied petitioner of a fair trial. Therefore, there is no reasoned
15 state court decision on the *gestalt* effect of the fundamental errors that marred petitioner's legal
16 proceedings. Accordingly, this Court is unconstrained by AEDPA and should consider, *de novo*, all
17 of the incidents of constitutional impropriety in the aggregate.

18 It is well established that a series of trial errors, though independently harmless, may in some
19 circumstances rise by accretion to the level of reversible and prejudicial error. See, e.g., Chambers v.
20 Mississippi, supra, (1973) 410 U.S. 284, 302. Thus, even in cases with strong government evidence,
21 reversal may be compelled when legal errors raise the strong possibility that aggregate prejudicial
22 effect of such was greater than the sum of the prejudice of each error standing alone. (Gerlaugh v.
23 Stewart, (9th Cir.) 129 F.3d at 1043.) In close cases, the cumulative effect of multiple errors can lead
24 to the miscarriage of justice even though impact of any one error may be relatively slight. While not
25

1 conceding that any of the errors mentioned in this petition were separately harmless, petitioner asserts
2 that their combined effect contributed to the adverse result. Consequently, a breach of the
3 Constitution has occurred, requiring issuance of the federal writ.

4 Petitioner believes that several of the errors mentioned in this petition are so fundamental that
5 reversal is required per se. Should this Court find that one or more of these errors is subject to a less
6 strict standard, the rule would apply that when a number of trial errors occur, the standard is whether
7 or not their cumulative effect had a substantial and injurious effect. (Brecht v. Abrahamson *supra*
8 507 U.S. 619, 637.) Furthermore, the prosecution bears the burden of demonstrating that the error
9 was not substantial and injurious and any doubt on this question should be resolved in favor of
10 granting relief. (O'Neal v. McAninch, (1995) 513 U.S. 432.)

12 In this case, petitioner's defense counsel failed to subpoena material exculpatory phone
13 records and he failed to lay proper grounds for admission into evidence a certified copy of an exhibit
14 that corroborated a defense witness' testimony; thus, allowing the witness to be falsely impeached by
15 the prosecution. Moreover, defense counsel told the jury that certain time proof would be
16 forthcoming, and then failed to deliver it. When the jury requested to see that evidence defense
17 counsel failed to get it, and the jury's request was denied. Not only was this deficient presentation of
18 the defense less helpful than a competent presentation would have been, it was actually harmful to
19 petitioner's defense. Trial counsel consistently told the jurors that he would prove that petitioner was
20 on the phone during the assault, and utterly failed to do so, harming the credibility of petitioner's
21 entire defense. The prosecutor's rebuttal highlighted counsel's failure; indeed, the prosecutor devoted
22 more of her closing argument to the phone records than petitioner's attorney did.

24 What's more, defense counsel did not interview or investigate anyone that wasn't already
25 listed in the reports in discovery. In doing this, he failed to find easily locatable eyewitnesses who

1 would have testified that petitioner had no role in the crimes. Carter and Brooks' testimony would
2 have further weakened the prosecution's theory of the case. The combined testimony of these
3 witnesses would have challenged DiPrima's version of the events and effectively corroborated
4 petitioner's defense. (Infra III).

5 The trial attorney also denied petitioner's express desire to testify. If this right had not been
6 denied, petitioner would have testified to his presence at the scene of the crime, without aiding and
7 abetting it, which is corroborated by petitioner's phone records that defense counsel failed to
8 subpoena and petitioner's ex-girlfriend's records that he failed to admit into evidence. Petitioner's
9 jury was also erroneously instructed on the theory of aiding and abetting, which substantially lowered
10 the prosecution's burden of proof—extricating petitioner's defense and placing the burden directly
11 on petitioner.
12

13 If defense counsel had taken the opportunity to set forth for the jury petitioner's theory of the
14 case, and had he introduced the contradictory evidence that was promised, reasonable doubt would
15 have been created in the minds of the jury. Trial counsel's mistakes completely undermine
16 confidence in the outcome. (Brown v Myers, (9th Cir. 1998) 137 F.3d 1154, 1156 [emphasizing that a
17 habeas petitioner "does not have to show by a preponderance of the evidence that the result in the
18 case would have been different but for counsel's errors," but rather that "counsel's errors undermine
19 confidence in the outcome."]
20

21 Defense counsel could have had no satisfactory tactic for excluding petitioner's testimony, the
22 phone records and exculpatory witnesses. Trial counsel's errors clearly prohibited petitioner from
23 presenting his defense to the jury. "When an attorney has made a series of errors that prevents the
24 proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in
25 assessing prejudice." (Taylor v. Duncan, (9th Cir. 1998) 158 F.3d 449, 457; Cooper v. Fitzharris, (9th

1 Cir. 1978) 586 F.2d 1325, 1333, ["[A]bsence of prejudice is not established by demonstrating that no
2 single error considered alone significantly impaired the defense[;] prejudice may result from the
3 cumulative impact of multiple deficiencies."]

4 When this Honorable Court considers the cumulative impact of defense counsel's errors it will
5 see that petitioner's jury could not be reasonably expected to fulfill their duty to determine whether
6 the state had met its burden. When all was said and done, the jury did not have the benefit of readily
7 available defense evidence before them, allowing them to be easily misled by the prosecution's
8 factual misrepresentations. Although the prejudice of all these errors would, in isolation, be assessed
9 as to "whether [they] had a substantial and injurious effect or influence in determining the jury's
10 verdict" under Brecht, in this case the errors occurred where the prosecutor had already
11 misrepresented material facts. As such, the prosecutor's factual misrepresentations (erroneously
12 arguing that there were no phone records showing that petitioner was on the phone even though the
13 record shows that she had a copy of the phone records in front of her) further aggravated the prejudice
14 stemming from the cumulative errors. Under Brecht, trial errors that are combined with a pattern of
15 prosecutorial misconduct may require reversal even if they do not substantially affect the verdict.
16 (Brecht at p. 638 fn. 9 [error must affect integrity of entire proceeding]. Accord Hardnett v. Marshall
17 (9th Cir. 1994) 25 F.3d 875, 879, 893 [footnote 9 error requires automatic reversal].
18
19

20 (2). Conclusion

21 The accumulation of errors in this case impacted petitioner's ability to present a viable defense
22 and denied him the opportunity to present material evidence. The errors also impacted the way in
23 which the jury considered the other evidence in this case. The cumulative effect of these errors were
24 per se prejudicial and, in any event, were substantial and injurious. When given the opportunity to
25 explain the alleged improprieties, trial counsel conceded to rendering ineffective assistance of

counsel. See Exhibit F, [in-camera hearing transcript]; and Exhibit H [trial counsel Jim Wall declaration] ¶ 1-4.

Due to the above, petitioner's imprisonment is in violation of his Federal Constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. For these reasons, a new trial should be granted pursuant to 28 U.S.C. 2254 (d)(1)&(2).)

THE PERSONAL INFLICTION
OF GREAT BODILY INJURY ENHANCEMENT

GROUND SIX: AS A MATTER OF LAW, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING OF PERSONAL INFLICTION OF GREAT BODILY INJURY.

(1). Introduction

Penal Code section 12022.7, subdivision (a) provides that "[a]ny person who *personally inflicts* great bodily injury..." (italics added) shall be punished. In the instant case, the evidence established that the two black males, not petitioner, were the ones who personally inflicted the injuries on DiPrima; thus, as a matter of law, the evidence is insufficient to support the great bodily injury enhancement. This unproven and unsupported finding violated petitioner's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

(2). There is insufficient evidence to support the determination that petitioner personally inflicted DiPrima's injuries.

As noted, Penal Code section 12022.7, subdivision (a) states that "[a]ny person who personally inflicts great bodily injury..." is subject to punishment. In the case of People v. Cole (1982) 31 Cal.3d 568, 571-572, the California Supreme Court held that this enhancement applies only

1 to those persons who themselves *actually and personally inflict the injury*, not to those who merely
 2 aid and abet:

3 "... We have concluded that the Legislature intended to
 4 impose an additional penalty for causing great bodily
 5 injury *only on those principles who perform the act that*
 6 *directly inflicts the injury*, and that one who merely aids,
 abets, or directs another to inflict the physical injury is
 not subject to the enhanced penalty of section 12022.7.

7
 8 In our opinion, the meaning of the statutory language is
 9 clear: the enhancement applies only to a person who himself
 10 inflicts the injury. ... It is doubtful that the Legislature could
 11 have enacted the statute in question more tersely to express the
 12 intended limitation on the class of individuals who may be
 13 exposed to an enhanced sentence for inflicting great bodily
 14 injury. Among the several dictionary definitions of 'personally,'
 15 we find the relevant meaning clearly reflecting what the
 16 legislature intended: 'done in person without the intervention of
 another; direct from one person to another.' (Webster's New
 Internat. Dict. (3d ed. 1961).) No other expression could have
 more clearly and concisely expressed what we interpret to be the
 plain meaning of the Legislature: that the individual accused of
 inflicting great bodily injury must be the person who directly
 acted to cause the injury. The choice of the word 'personally'
 necessarily excludes those who may have aided or abetted the
 actor directly inflicting the injury." (Emphasis added)

17 (Accord, People v. Bland (2002) 28 Cal.4th 313, 337; People v. Gutierrez (1996) 46 Cal.App.4th 804,
 18 813, ["... section 12022.7... is limited in its applicability to the defendant who performs the act
 19 directly inflicting the injury."])

20
 21 In petitioner's trial it was established that "Bob Marley" and the other black male (not
 22 petitioner) were the ones who inflicted great bodily injury—they punched DiPrima, hit him
 23 repeatedly with the belt, stomped on his head, and hit him with a Duraflame log. It was alleged that
 24 petitioner held DiPrima. Although the supposed hold was alleged to have choked DiPrima, there is
 25 no evidence that he suffered any injury as a result.

1 DiPrima did not know whether petitioner had ever struck him. He told Detective Pata that
2 petitioner "... **didn't hit**," which Pata understood as petitioner "[n]ever struck him with his hands..."
3 (RT 746.) When asked, "Do you know if the defendant ever hit you with a closed fist or kicked
4 you?" DiPrima answered, "I **do not**." (RT 583; emphasis.) He also testified:

5 "MR. WALL [Defense counsel]: Q. Do you recall
6 telling her that all of them traded off holding you down,
7 Kicking you and punching you?

8 A. I do.

9 Q. How many times did Mr. Voelker punch you?

10 A. The only time that I could see people actually
11 hitting me is when Mr. Voelker had me in a restrained hold.

12 Q. How many times did you see him punch you, if any?

13 A. How -- again, that's the only time I could see
14 people attacking me. So *maybe he attacked me* while I was
15 like this the whole time on the ground, like I'm sure he kicked me
16 or punched me, like, five, ten times. *I don't see why he wouldn't have.*

17 Q. So he kicked you or punched you five to ten times?

18 A. That's just a rough estimate. ...

19 MR. Wall: Q. You said that he was holding you,
20 with which arm?

21 A. He -- I'm not sure which arm it was, one of his arms,
22 he was choking me.

23 Q. And the other arm he was hitting you, right?

24 A. *I don't know.*

25 Q. You just said just a few seconds ago that he was hitting
you five to ten times. Do you recall specifically any of the
times where he hit you?

A. Again, I said the only time that I could see who was
hitting me was when he was holding me. That's the only time I

1 could see this mulatto guy above me beating me with my belt
2 and -- and this other guy taking off my watch and breaking
3 my chain off. That's the only time that I could see *those two*
4 *guys beating me*, and he was behind me holding me. And
other than that, like I said, *he could have -- he could have beat*
me any time I was on the ground--

5 Q. Okay.

6 A. -- like *how was I supposed to know?*

7 Q. You said that he -- five to ten times. Is there any
8 time that you remember after you were on the ground and you
got up that he hit you?

9 A. Again, like, *I couldn't see*, I was protecting my head.

10 Q. You said that -- after you'd gotten up, that you
11 were standing over by the computer desk --

12 A. M-hm.

13 Q. -- correct?

14 A. Yeah.

15 Q. And your hands were over your head then?

16 A. No, I was standing up.

17 Q. Did he hit you then?

18 A. At that point, no...." (RT 492-494; emphasis added.)

19
20 Clearly, DiPrima had no idea whether petitioner had done anything other than allegedly hold
21 him. He was merely guessing that petitioner had personally hit him. However facts must be proved
22 by evidence not by conjecture, guess work or wishful thinking. (U.S. v. Dunlap (8th Cir. 1994) 28
23 F.3d 823; U.S. v. Rahseparian (10th Cir. 2000) 231 F.3d 1257. [A jury may make inferences only
24 where those inferences can be made beyond a reasonable doubt: it may not speculate.])
25

1 While DiPrima's testimony indicated that the two black males personally inflicted great bodily
 2 injury, it did not show that petitioner had *personally* done so, nor did the prosecutor argue that
 3 petitioner directly performed or personally inflicted *any* of the injuries that formed the basis of the
 4 great bodily injury allegation. As a matter of law, DiPrima's speculative testimony is not sufficient to
 5 support the jury's finding on the *personal* infliction of great bodily injury enhancement.

6 A personal infliction finding which is not supported by substantial evidence violates a
 7 defendant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental
 8 fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
 9 (Accord, Jackson v. Virginia (1979) 433 U.S. 307, 315-316; In re Winship (1970) 97 U.S. 358.)

11 (3). Conclusion

12 The true finding on the personal infliction of great bodily injury enhancement is not supported
 13 by substantial evidence; thus, the finding is unconstitutional.

14 **GROUND SEVEN: IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY**
 15 **PURSUANT TO CALJIC No. 17.20 BECAUSE IT ALLOWED THE JURY TO FIND**
 16 **PETITIONER GUILTY WITHOUT MEETING THE STATUTORILY REQUIRED**
 17 **ELEMENTS OF PENAL CODE § 12022.7 IN VIOLATION OF PETITIONER'S RIGHTS TO**
 18 **DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION.**

19 (1). Introduction.

20 As noted in the previous section, it has long been established that the enhancement for
 21 infliction of great bodily injury, within the meaning of Penal Code section 12022.7, applies only to
 22 those who have been found to have *personally* and directly caused the victim to suffer great bodily
 23 injury. "[A] defendant cannot receive an enhanced sentence under section 12022.7 on a theory of
 24 vicarious liability." (People v. Rodriguez, (1999) 69 Cal. App. 4th 341, 348.) "To 'personally inflict'
 25 injury, the actor must do more than take some direct action which proximately causes injury. *The*
defendant must directly, personally, himself inflict the injury." (Rodriguez, supra, at p. 349; italics

1 added.) Therefore, one who "aids, abets, or directs another to inflict the physical injury is not subject
2 to the enhanced penalty of section 12022.7." (People v. Cole, (1982) 31 Cal.3d at 571.)

3 In the instant case, the trial court instructed the jury that they were to be guided by aiding and
4 abetting instructions and CALJIC No. 17.20 in determining whether petitioner had *personally*
5 inflicted great bodily injury pursuant to Penal Code §12022.7 (CT 364; RT 1240.) However,
6 CALJIC No. 17.20 is unconstitutional because it lowers the prosecution's burden of proof by omitting
7 a material element of the enhancement. As petitioner will show, the result of this misinstruction
8 violated his rights to due process, a fair trial, a jury trial, and fundamental fairness under the Fifth,
9 Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

11 (2). **CALJIC No. 17.20 is unconstitutional**

12 Penal Code section 12022.7, subdivision (a) states in pertinent part, that:

13 Any person who *personally* inflicts great bodily injury on any
14 person other than an accomplice in the commission of a felony or
15 attempted felony shall be punished by an additional and
consecutive term of imprisonment in the state prison for three
years. (Italics added.)

16 Regarding the great bodily injury enhancement, the jury was instructed, pursuant to CALJIC
17 17.20, that:

18 When a person participates in a group beating and *it is not possible to*
19 *determine which assailant inflicted a particular injury*, he may be found to
20 have personally inflicted great bodily injury upon the victim, if 1) the
21 application of force upon the victim was of such nature that, by itself, it
22 *could have caused* the great bodily injury suffered by the victim; or 2) that
23 at the time the defendant personally applied unlawful physical force to the
24 victim, the defendant knew that other persons, as a part of the same
25 incident, had applied, were applying, or would apply unlawful physical
force upon the victim and the defendant then knew or reasonably should
have known that the cumulative effect of all the unlawful physical force
would result in great bodily injury to the victim. (CT 364; RT 1240;
italics added.)

1 It is well settled that trial courts are required to accurately and completely instruct jurors as to
 2 the elements of charged offenses. (Cabana v. Bullock (1986) 474 U.S. 376, 385 ["A defendant
 3 charged with a serious crime has the right to have a jury determine his guilt or innocence, ... and a
 4 jury's verdict cannot stand if the instructions provided to the jury do not require it to find each
 5 element of the crime..."])

6 Under section 12022.7, the only proper basis for a jury to have found petitioner guilty of
 7 infliction of great bodily injury is that he must have *personally* delivered the injurious blow. Neither
 8 basis stated in CALJIC No. 17.20 comply with this requirement. The first basis encourages the jury
 9 to speculate as to whether the defendant performed the act causing the victim's injuries. This is
 10 directly in conflict with the plain and unambiguous language of the statute. Thus, the jury was
 11 instructed that even if they could not find that petitioner *personally* inflicted the great bodily injury
 12 they would still be required to find the allegation to be true as long as they felt that petitioner "*could*
 13 *have caused* the great bodily injury suffered by the victim." (CALJIC No. 17.20; CT 364; RT 1240;
 14 italics added.) Petitioner's trial established that "Bob Marley" and the other black male (not
 15 petitioner) were the ones who inflicted the great bodily injury—they punched DiPrima, hit him
 16 repeatedly with the belt, stomped on his head, and hit him with a Duraflame log.¹⁶

16 Unlike other group beating cases, this case presents a situation in which it is clear to see who
 17 inflicted the great bodily injury: It was alleged, albeit incorrectly, that petitioner held DiPrima
 18 while the two black males inflicted great bodily injury. Thus, assuming arguendo that CALJIC No.
 19 17.20 is not unconstitutional, it was error to give this instruction because CALJIC No. 17.20
 20 should not be given when it is possible to determine who inflicted the injurious blows. (People v.
 21 Corona (1989) 213 Cal.App.3d 589.) Furthermore, "[t]he prosecution does bear the burden of
 22 showing that it cannot be determined which assailant inflicted a particular injury in the context of a
 23 group beating." (People v. Banuelos, 106 Cal.App.4th 1332.)

1 Ultimately, DiPrima did not know whether petitioner had ever hit him. He told Detective
2 Pata that petitioner "... didn't hit," which Pata understood as petitioner "[n]ever struck him with his
3 hands..." (RT 746.) When asked, "Do you know if the defendant ever hit
4 you with a closed fist or kicked you?," DiPrima answered, "*I do not.*" (RT 583; italics added.)

5 DiPrima's testimony did not show that petitioner had *personally* hit him, nor did the
6 prosecutor argue that petitioner directly performed or personally inflicted **any** of the injuries that
7 formed the basis of the great bodily injury allegation. Thus, the only possible basis for the jury's
8 finding that the great bodily injury enhancement was true came by application of the improper
9 instruction which told the jury if "when a defendant participates in a group beating and when its not
10 possible to determine which assailant inflicted which injuries, the defendant may be punished with a
11 great bodily injury enhancement if his conduct was of nature that it *could have caused* the great
12 bodily injury suffered." (CALJIC No. 17.20; italics added.)

14 **(3). The erroneous giving of CALJIC No. 17.20 allowed petitioner's jury to**
15 **find liability in the absence of proof that he *personally* inflicted the great bodily**
16 **injury.**

17 Despite Penal Code Section 12022.7's unambiguous language that liability for personal
18 infliction of great bodily injury may only be based on direct, personal action by a defendant, CALJIC
19 No. 17.20 allowed petitioner's jury to find the great bodily injury enhancement true even if it did not
20 find that he, himself, had *personally* inflicted the great bodily injury. This misinstruction allowed the
21 jury to find personal infliction of great bodily injury if it felt that petitioner had participated in a
22 group beating, it was not possible to determine which assailant inflicted a particular injury, and he
23 "could have caused the great bodily injury suffered." **In other words**, it allowed a finding of
24 personal infliction of great bodily injury in the absence of a finding that petitioner personally inflicted
25

1 the great bodily injury, so long as the jury felt that petitioner was involved—in any way—in the
2 group beating, and "could have" applied force resulting in great bodily injury.

3 The Use Note to CALJIC No. 17.20 states that the instruction is derived from People v.
4 Corona (1989) 213 Cal.App.3d 589. Corona carved out a narrow "group beating" exception to the
5 statutory requirement that personal infliction of great bodily injury be inflicted personally. It held
6 that "when a defendant participates in a group beating and *when it is not possible to determine which*
7 *assailant inflicted which injuries*, the defendant may be punished with a great bodily injury
8 enhancement if his conduct was of nature that it could have caused the great bodily injury suffered."
9 (Ibid.; italics added.)

10
11 Here, petitioner's trial established that "Bob Marley" and the other black male (not petitioner)
12 were the ones who inflicted the great bodily injury; thus, CALJIC No. 17.20 should not have been
13 given. As given here, CALJIC No. 17.20 clashed with the statutory language of section 12022.7, as
14 the clear and unambiguous statutory language limits the category of persons subject to the
15 enhancement to those who directly perform the act that causes the physical injury to the victim. In
16 other words, the giving of CALJIC No. 17.20 in this case was erroneous because 1.) The analytic
17 touchstone for the Corona exception is impossibility of determining who inflicted the great bodily
18 injury (an issue that was not implicated in the instant case); and 2.) the instruction permitted the jury
19 to draw an inference on the basis of inconclusive evidence: that petitioner "**could have caused**" the
20 great bodily injury suffered. In American jurisprudence, however, convictions must be proved by
21 evidence, not speculation. U.S. v. Dunlap (8th Cir. 1994) 28 F.3d 823; U.S. v. Rahseparian (10th Cir.
22 2000) 231 F.3d 1257.
23
24
25

(4). The instruction's omission of a material element of the enhancement lowered the prosecution's burden of proof and deprived petitioner of his federal rights to due process of law.

The United States Constitution requires that the trial court give instructions regarding—and the jury determine—all material elements of an enhancement that increases a defendant's punishment beyond the statutory maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.) That standard is applicable here because the great bodily injury enhancement transformed petitioner's convictions into serious felonies under the Three Strikes statute (§ 1192.7 subd. (c)(8)) so it constituted a sentencing enhancement of 25 years to life in prison for any future felony. It can not be argued that petitioner's federal rights will not be at issue until a future felony may be charged, for it is the jury's finding of great bodily injury here that mandates enhancement of any future felony sentence. The status of a felony as "serious" is determined upon the date of conviction. (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).)

This is the moment—the only moment—petitioner can litigate the great bodily injury finding, for once established in this case, it will be binding forever. Accordingly, the instruction's omission of the material element that petitioner himself *personally* inflicted the great bodily injury violated his Constitutional right to proof beyond a reasonable doubt.

While it could be argued that it is difficult to prove who inflicted what injury in a "group attack," difficulty of proof does not justify lessening the prosecution's burden. Even though "[c]ourts must be sensitive to the difficulties attendant upon the prosecution of [certain kinds of cases] ... 'this court cannot alter evidentiary rules because litigants might prefer different rules in a particular class of cases.'" (*Tome v. U.S.* (1995) 513 U.S. 150, 165-67, quoting *U.S. v. Salerno* (1992) 505 U.S. 317, 332.)

1 **(5). The Erroneous giving of CALJIC No. 17.20 Expanded liability and, thus,**
 2 **violated the Rule of Lenity.**

3 Ambiguities in penal statutes must be resolved in favor of the defendant. The rule, called the
 4 rule of lenity, controls in both the U.S. Supreme Court and this court. (See, e.g., Bifulco v. United
 5 States (1980) 447 U.S. 381, 387.) Under the separation of powers doctrine, the rule serves to protect
 6 the legislature's exclusive authority to define crimes from judicial encroachment. As a matter of
 7 fundamental due process, the rule helps to ensure that citizens are given fair warning of conduct
 8 punishable as crime.

9 CALJIC No. 17.20 expands liability for personal infliction of great bodily injury beyond the
 10 offense defined by the clear and unambiguous language of the statute, and, thus, violates the rule of
 11 lenity. Failure to honor that rule violated petitioner's Fourteenth Amendment right to due process of
 12 law. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346-347 [state's arbitrary denial of its own domestic
 13 rules may implicate due process].)

14 **(6). The error was prejudicial because it is not possible to determine whether**
 15 **the jury relied on the erroneous legal theory.**

16 When a jury is instructed on alternate theories, one of which is legally improper, reversal is
 17 required unless the record reflects that the jury's finding was not based on the legally invalid theory.
 18 Under this rule, the conviction (or finding in this case) must be reversed unless the prosecution can
 19 establish that no juror relied upon the improper theory. (Burks v. United States, 47 U.S. 1 (1978).)
 20 No such finding is possible here because the prosecutor relied heavily on the erroneous instruction
 21 during her closing argument – she argued the actions of "Bob Marley" and the other assailant (not
 22 me), "We have a stomp to the head, we have a ... whack against the victims head with a Duracell log
 23 (sic), we have him being whipped repetitively with a belt" (RT 1325), and urged the jury to base its
 24 finding of guilt on the erroneous instruction.
 25

1 There is nothing in the record before this court which indicates that the jury's true finding was
 2 not based on the misapplied instruction. As it can not be demonstrated that the jury surely did not
 3 rely on the erroneous instruction, the enhancement must be reversed. See Keating v. Hood 191 F.3d
 4 1053, 1062, ["We have consistently interpreted Supreme Court precedent to require reversal in any
 5 case in which a verdict may have rested on a legally invalid ground."]

6
 7 (7). **The aiding and abetting instructions complicated the erroneous giving of**
 8 **CALJIC No. 17.20.**

9 As noted in the previous sections, Penal Code section 12022.7, subdivision (a) states that
 10 "[a]ny person who personally inflicts great bodily injury..." is subject to punishment. In the case of
 11 People v. Cole, supra, (1982) 31 Cal.3d 568, 571-572, the California Supreme Court held that this
 12 enhancement applies only *to those persons who themselves actually and personally inflict the injury*,
 13 and that one who merely *aids, abets*, or directs another to inflict the physical injury is not subject to
 14 the enhanced penalty of section 12022.7. (Ibid.)

15 In the instant case, petitioner's jury was instructed with aiding and abetting instructions. (CT
 16 pp. 342, 343, 344; CALJIC numbers 3.00, 3.03, and 4.51) Because CALJIC Numbers 3.00, 3.03, and
 17 4.51 apply when a defendant is an aider and abettor, they should not have been given in combination
 18 with CALJIC No. 17.20. As given here, these aiding and abetting instructions simply provided an
 19 additional basis upon which the jury could find petitioner guilty of personal infliction of great bodily
 20 injury without finding that petitioner had *personally* inflicted such injury.

21 CALJIC Number 3.00 instructed the jury that "[e]ach principal, regardless of the extent or
 22 manner of participation is equally guilty. Principals include ...[t]hose who aid and abet the
 23 commission of the crime." (CT 342.)

24 CALJIC 4.51, the Alibi – Aider and Abettor or Co-Conspirator instruction, informed the jury
 25 that:

1 If the evidence establishes beyond a reasonable doubt that the
 2 defendant aided and abetted the commission of the crime charged
 3 in this case, the fact, if it is a fact that he was not present at the time
 4 and place of the commission of the alleged crime for which he is
 being tried does not matter and does not, in and of itself, entitle the
 defendant to an acquittal. (CT 344)

5 An aider and abettor can not be punished with the enhanced punishment of 12022.7. As it
 6 cannot be demonstrated that the jury surely did not rely on the aiding and abetting instructions, the
 7 enhancement must be reversed.

8 (8). As the error went to an enhancement that increases the penalty for a
 9 crime beyond the statutory maximum, it must be judged under the
standard of *Brecht v. Abrahamson*.

10 As discussed above, a trial court's failure to instruct the jury on an element of a sentence
 11 enhancement provision that increases the penalty for an underlying crime beyond the statutory
 12 maximum is federal constitutional error. (*In re Winship* (1970) 97 U.S. 358.) The *Brecht* standard is
 13 just as applicable to a "misinstruction" on an element as it is to a failure to instruct on an element and
 14 the prosecution bears the burden of demonstrating that the error was "harmless beyond a reasonable
 15 doubt." (*O'Neal v. McAninch*, (1995) 513 U.S. 432.)

16 Here, the challenged instruction went to the heart of the jury's true finding of great bodily
 17 injury: as previously shown, DiPrima was merely guessing that petitioner had hit or kicked him.
 18 DiPrima later testified that, in reality, he did not know whether petitioner had ever struck him. (RT
 19 492-494, 583.) He told Detective Pata that petitioner "... didn't hit" him. (RT 746.) Although it was
 20 alleged that petitioner choked DiPrima, there is no medical evidence that he suffered an injury as a
 21 result. Indeed, there is no medical evidence that he was choked at all. (Please see the testimony of
 22 the Medical Doctor. (RT 367-368.)) Furthermore, there was no evidence whatsoever to show that
 23 petitioner had personally inflicted great bodily injury.
 24
 25

1 (9). Because *People v. Corona* misstates and misinterprets the statute and
 2 legislative intent, it deprived petitioner of his right to due process of law
and to proof beyond a reasonable doubt under the Federal Constitution.

3 Corona purported to create a "group beating exception" to the statutory requirement that
 4 personal infliction of great bodily injury be inflicted personally. The court held that "when a
 5 defendant participates in a group beating and *when its not possible to determine which assailant*
 6 *inflicted which injuries*, the defendant may be punished with a great bodily injury enhancement if his
 7 conduct was of nature that it *could have caused* the great bodily injury suffered." (Ibid.; italics
 8 added)

9
 10 The Corona holding and, thus, CALJIC No. 17.20, is not the law, but a "narrowly carved
 11 exception" to the law. It removes the element of *personal* infliction of great bodily injury from the
 12 offense in certain circumstances. As Corona's expansion of liability to persons who have not been
 13 proved to have *personally* and directly inflicted great bodily injury stands in clear contradiction to the
 14 language of the statute it constitutes impermissible judicial legislation and invasion of the
 15 Legislatures designated sphere, in violation of the doctrine of separation of powers that is enshrined
 16 in the Constitution and fundamental to the preservation of our civil liberties. (U.S. v. Bass (1971)
 17 404 U.S. 336, 348 [violation of doctrine of separation of powers violates Fourteenth Amendment].)

18 (10). *Corona* impermissibly lowers the prosecutions burden of proof by allowing
 19 liability for personal infliction of great bodily injury on the speculative
 20 basis of what "could have" caused the injury.

21 In addition to allowing the jury to find personal infliction of great bodily injury without
 22 finding that petitioner had *personally* and directly inflicted such injury, Corona, and hence, the
 23 challenged instruction, further lowers the prosecution's burden of proof by allowing liability if "the
 24 application of unlawful physical force upon the victim was of such a nature that, by itself, it **could**
 25 **have caused** the great bodily injury." (CT 364; RT 1240, emphasis added.) This formulation blinds

1 the prudence of distinguished centuries of Anglo-American jurisprudence. What "could have caused
 2 injury" is a fancy that belongs in the airy realms of the subjunctive, it sails on wisps of abstract
 3 reasoning and speculation; it slides on possibility and chance. Criminal liability and punishment, in
 4 contrast, must be embedded in indisputable fact, securely fastened in the absolute "beyond a
 5 reasonable doubt."

6 The Corona holding hinders the Legislature's intent. Its imposition of liability on a person
 7 who may have participated in a group beating without, himself, directly inflicting great bodily injury
 8 removes all reason for individual restraint, for under Corona, once someone is involved in a group
 9 beating situation, he is fully liable for great bodily injury regardless of his own level of involvement
 10 in the creation of the injury.
 11

12 Corona sought to justify its expansion of liability by citing the difficulty of proving which
 13 defendant in a group beating was responsible for a victim's injuries. (*Id.* at p. 594.) Difficulty of
 14 proof, however, does not excuse the judicial removal of a material element of the statute, an excision
 15 that violates a defendant's due process right to jury determination of every material element of the
 16 offense. (*Tome v. U.S.*, *supra*, 513 U.S. at p. 165-67.)

17 Group assaults (Corona) present problems of proof of individual liability, and problems of
 18 punishment where that proof is lacking. Resolving those problems necessarily involves a choice:
 19 shall the law allow persons who may have been guilty, but could not be proved to be so, evade
 20 liability, or shall it inflict enhanced punishment and liability for a serious felony on persons who did
 21 not, in fact, personally inflict great bodily injury?¹⁷
 22

23
 24 17 While paraphrasing Sir William Blackstone, Thomas Jefferson was once conveyed the opinion that
 25 it would be far better to allow ten guilty persons to go free then it would be to strip the liberty
 away from one innocent. Is such sentiment simply pretentious rhetoric, or rather a cardinal
 principle of Anglo-American jurisprudence?

1 The California Legislature, however, has assisted us with the answer to the aforementioned
2 question. Its amendment of section 12022.7 to add the word "personally" shows an unambiguous
3 decision to define the enhancement to ensure that only those who have been proven to *personally*
4 inflict great bodily injury are subjected to an immediate three year enhancement to their sentences
5 and the consequences of having a serious, "strike" felony on their record for life.

6
7 **(11). As the error affected the reasonable doubt standard, it is**
8 **reversible per se.**

9 The U.S. Supreme Court has made clear that a constitutionally deficient reasonable doubt
10 instruction is a structural defect in the trial mechanism that requires reversal regardless of the strength
11 of the evidence of the defendant's guilt. (Sullivan v. Louisiana (1993) 508 U.S. 275, 277-278.)

12 "Since a constitutionally defective reasonable doubt instruction
13 renders it impossible for the jury to return a verdict of guilty beyond
14 a reasonable doubt, there is no object, so to speak, upon which a
15 harmless-error scrutiny can operate. The most an appellate court
16 can conclude is that the jury would surely have found petitioner
17 guilty beyond a reasonable doubt – not that the jury's actual finding
18 of guilty beyond a reasonable doubt would surely not have been
19 different absent the constitutional error. That is not enough.
20 [Citation.] The Sixth Amendment requires more than appellate
21 speculation about a hypothetical jury's action, or else directed
22 verdicts for the State would be sustainable on appeal; it requires an
23 actual jury finding of guilty." (Sullivan, *supra*, at 280.)

24 The jury here was advised that it could find liability on the basis of what "*could have*"
25 happened, as opposed to the constitutionally required standard of certainty beyond a reasonable
doubt. As a constitutionally deficient reasonable doubt instruction cannot be harmless error, the
reduction of the prosecution's burden of proof on an element of the offense was structural error,
requiring reversal per se on the finding of personal infliction of great bodily injury, for the finding of
personal infliction was inextricably tainted by the erroneous instruction on group beatings.

1 (12). The second basis allows the jury to substitute a knowledge finding for a
 2 finding that petitioner personally performed the act causing the victim's
 injuries.

3 The second basis of the instruction is also unconstitutional because it allows the jury to
 4 substitute a knowledge finding for a finding that petitioner directly performed the act causing the
 5 victim's injuries. Section 12022.7 does not, however, permit a knowledge finding to obviate the need
 6 for a finding that the defendant himself inflicted the injury.

7 The second alternate basis allows the jury to substitute a knowledge finding for a finding that
 8 petitioner directly performed the act causing the victim's injuries. This is directly in conflict with the
 9 plain and unambiguous language of the statute. Thus, the jury was instructed that even if they found
 10 that petitioner did not *directly* and *personally* inflict the great bodily injury they would still be
 11 required to find the allegation to be true as long as they felt that petitioner "**knew**" that others had
 12 applied, were applying, or would apply physical force and that petitioner "**knew or should have**
 13 **known**" that the cumulative effect of all the unlawful physical force would result in great bodily
 14 injury.
 15

16 As previously illustrated, petitioner's trial established that "Bob Marley" and the other black
 17 male (not petitioner) were the ones who punched DiPrima, hit him repeatedly with the belt, stomped
 18 on his head, and hit him with a Duraflame log. Ultimately, DiPrima did not know whether petitioner
 19 had ever hit him. He told Detective Pata that petitioner "... **didn't hit**," which Pata understood as
 20 petitioner "[n]ever struck him with his hands..." (RT 746.) When asked, "Do you know if the
 21 defendant ever hit you with a closed fist or kicked you?" DiPrima answered, "**I do not**." (RT 583;
 22 emphasis.)
 23

24 DiPrima's testimony did not show that petitioner had personally hit him, nor did the
 25 prosecutor argue that petitioner directly performed or personally inflicted *any* of the injuries that

1 formed the basis of the great bodily injury allegation. Thus, the basis for the jury's finding that the
 2 great bodily injury enhancement was true came by application of CALJIC 17.20 which told the jury
 3 that if petitioner "... knew that other persons, as part of the same incident, had applied, were applying,
 4 or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably
 5 should have known, that the cumulative effect of all the unlawful physical force would result in great
 6 bodily injury to the victim" then petitioner had *personally* inflicted great bodily injury within the
 7 meaning of § 12022.7.

8
 9 (13). **The error was prejudicial under the *Brecht* Standard.**

10 As the instruction at issue here lessened the prosecution's burden of proof, it falls squarely
 11 under Sullivan, supra, and should be reversed per se. However, should this Honorable Court disagree,
 12 the error was prejudicial under the federal standards for the reasons discussed above.

13 (14). **Conclusion.**

14 CALJIC No. 17.20 was prejudicial under the circumstances of the instant case. As shown in
 15 the previous sections of this Petition, DiPrima was merely guessing that I hit or kicked him. DiPrima
 16 later testified that, in reality, he did not know whether I had ever struck him. (RT 583.) He told
 17 Detective Pata that petitioner "didn't hit" him. (RT 746.) In regards to the conviction, though, the
 18 prosecutor argued the actions of the two black youth, "We have a stomp to the head, we have a ...
 19 whack against the victim's head with a Duracell log (sic), we have him being whipped repeatedly with
 20 a belt" (RT 1325), and urged the jury to find the infliction of great bodily injury enhancement to be
 21 true based upon this conduct. Thus, the prosecutor directed the jury to base its finding of guilt on the
 22 erroneous instruction—CALJIC No. 17.20, which told the jury that "the defendant may be
 23 punished with a great bodily injury enhancement if his conduct was of nature that it *could have*
 24 *caused* the great bodily injury suffered." (Ibid.; emphasis added.)
 25

1 Based on CALJIC No. 17.20, the prosecutor's argument, the aiding and abetting instructions
 2 and DiPrima's own testimony: "*he could have -- he could have* beat me any time I was on the ground
 3 -- like how was I supposed to know?" (RT 494; emphasis added), the jury was not required to find
 4 that petitioner personally inflicted great bodily injury. A reasonable juror would have readily
 5 understood that it was not necessary to a true finding that petitioner *personally* inflicted the injury if
 6 the jury utilized the court's instructions. The writ should issue

7
 8 **GROUND EIGHT: THE PERSONAL INFLICTION OF GREAT BODILY INJURY**
ENHANCEMENT WAS WRONGLY REINSTATED.

9 On July 30, 2004, pursuant to the prosecution's express motion "... with regards to the
 10 12022.7...", the trial court dismissed the infliction of great bodily injury enhancement. (RT 1374.) At
 11 sentencing (five months later), the prosecutor argued that she had made a mistake, and that the Penal
 12 Code section 12022.1 out on bail enhancement was the one she wanted to dismiss. The trial court
 13 found that the dismissal of the great bodily injury enhancement was an error, reinstated it, and
 14 dismissed the on bail enhancement. Trial counsel objected. (RT 1384-1389; and see RT 1344 where
 15 the parties discuss "... the enhancement attached to Count Three...", i.e., the on bail enhancement.)
 16 Petitioner was subsequently sentenced to three years in prison on the great bodily injury
 17 enhancement. However, the reinstatement of the enhancement was error as a matter of law and
 18 violated petitioner's rights to due process and against double jeopardy under the Fifth, Sixth, and
 19 Fourteenth Amendments.

20
 21 Here, the prosecution moved that the Penal Code section 12022.7 enhancement be dismissed
 22 and the trial court granted the motion and dismissed the enhancement. A dismissal "... cuts off an
 23 action or part of an action against the defendant." (People v. Carillo (2001) 87 Cal.App.4th 1416,
 24 1421.) And, like a striking, a dismissal, "... is an unconditional deletion of the legal efficacy of the
 25 stricken allegation or fact for the purposes of a specific proceeding." (Id.) "The fact that the

1 [dismissal] order was made inadvertently does not derogate from constitutional jeopardy preventing
2 further prosecution from attaching." (In re Krieger (1969) 272 Cal.App.2d 866, 891.)

3 In Fong Foo v. United States (1962) 369 U.S. 141, the trial court mistakenly directed a verdict
4 of acquittal. The Court of Appeals vacated the judgment and reassigned the case for trial. The
5 Supreme Court reversed, holding that even if "... the acquittal was based upon an egregiously
6 erroneous foundation ...[t]he verdict of acquittal was final, and could not be reviewed ... without
7 putting (the petitioners) twice in jeopardy, and thereby violating the constitution." (369 U.S. at 143,
8 82 S.Ct. 672.)

9
10 The fundamental principle stated in Fong Foo has been reiterated numerous times. (See, e.g.,
11 Sanabria v. United States (1978) 437 U.S. 54, 64 ["... when a defendant has been acquitted at trial he
12 may not be retried on the same offense, even if the legal rulings underlying the acquittal were
13 erroneous."]; United States v. Martin Linen Supply Co. (1977) 430 U.S. 564, 568-571; United States
14 v. Giampa (3rd Cir. 1985) 758 F.2d 928, 932.)

15 Petitioner acknowledges that the trial court's dismissal of the section 12022.7 enhancement
16 was not an acquittal. However, in United States v. Scott (1978) 437 U.S. 82, the Court recognized
17 that the double jeopardy protections may apply in situations "... in which the trial judge terminates the
18 proceedings favorably to the defendant on a basis not related to factual guilt or innocence." (437 U.S.
19 at 92.) Such situations occur *only* where the defendant chooses to seek termination of the action.
20 (Scott, supra, 437 U.S. at 98-101; accord, United States v. Dahlstrum (9th Cir. 1981) 655 F.2d 971,
21 975-976.) Here, the dismissal of the enhancement was pursuant to the prosecutor's motion. Thus, the
22 principles of Fong Foo preclude reinstatement.

23
24 The California Courts held that the trial court's dismissal was a clerical error and that it was
25 properly corrected. (Exhibit C, 16-17.) But, a clerical "... error is one "which cannot reasonably be

1 attributed to exercise of judicial consideration..." (Wetson v. Wilson (1952) 109 Cal.App.2d 673,
 2 674.) "'Clerical' errors are, generally speaking, those errors, mistakes, or omissions which are not a
 3 result of the judicial function." (Smith v. Smith (1952) 115 Cal.App.2d 92, 99.) Unless the order was
 4 made inadvertently, it cannot be changed under the guise of clerical error. (Tokio Marine v. Western
 5 Pac. Roofing Corp. (1999) 75 Cal.App.4th 110, 117.)

6 Here, the prosecutor expressly moved to dismiss the Penal Code section 12022.7
 7 enhancement. The trial court advertently granted the motion made by the prosecutor. The prosecutor
 8 then notified the probation department that the court had dismissed the 12022.7 enhancement and
 9 that it was no longer applicable for sentencing. There was nothing inadvertent in this judicial action.
 10 "If the court misconstrued the evidence before it, or misapplied the law applicable to the facts
 11 disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical
 12 error..." (Tokio Marine, supra, 75 Cal.App.4th at 118.) Clearly, the trial court's granting of the
 13 prosecution motion was not a clerical error. If anything it was a judicial error, which cannot be so
 14 corrected. (Bulkey v. Klein (1962) 206 Cal.App.2d 742, 750 ["although the inherent power to amend
 15 is records so as to make them speak the truth extends to all courts..., judicial error may not be so
 16 corrected."]) Here, by reinstating the enhancement, the trial court made of record an order that was
 17 never in fact given. As a matter of law, the granting of the prosecution's motion was attributable to
 18 "judicial consideration;" thus, it could not be changed under the guise of "clerical error."
 19

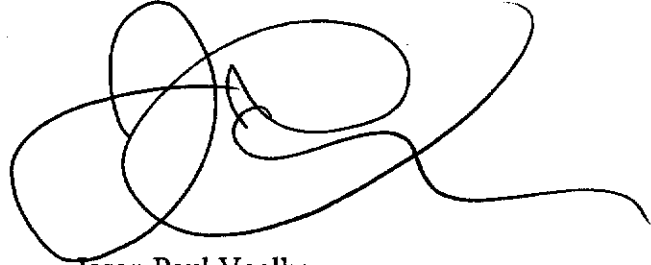
20 Furthermore, in California "... *an error in a request for dismissal does not constitute a*
 21 *'clerical error' in the court's records and thus cannot be corrected as such.*" (Romadka v. Hodge
 22 (1991) 232 Cal.App.3d 1231, 1235, fn.2, [emphasis added]; accord, Roybal v. University Ford (1989)
 23 207 Cal.App.3d 1080, 1084-1085.)
 24
 25

1 As a matter of law, once the trial court dismissed the enhancement pursuant to the
2 prosecution's motion, it had no power or authority to reinstate it. Reinstatement of the enhancement
3 under the clerical error doctrine was unconstitutional and contrary to United States Supreme Court
4 precedent.

6
7 **CONCLUSION**

8 For the foregoing reasons the writ should issue.¹⁸

9
10 Respectfully submitted.

11
12
13
14 

15 Jason Paul Voelker
16 California State Prison, Folsom
17 P.O. Box 950
18 Folsom, CA 95763
19 Prison I.D. # V-62496

20 In propria persona

21
22
23 Dated: 3-2-08

24 ¹⁸ Petitioner believes that all of the above issues should be resolved directly on the merits. However,
25 should respondent attempt to invoke some unforeseeable procedural defense, petitioner reserves the
right to fully litigate the adequacy and independence of any such claim. Moreover, petitioner has
reserved an exhausted ineffective assistance of counsel claim in the event this Court subsequently
requires a cause and prejudice analysis.

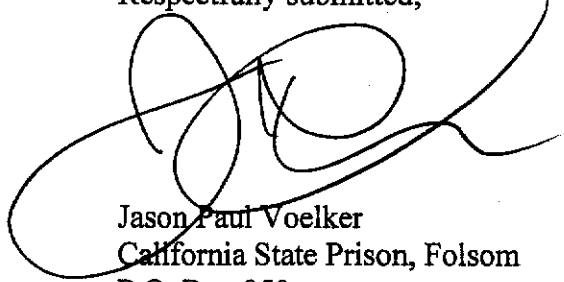
VERIFICATION & DECLARATION

I, Jason Paul Voelker, acting in pro se, declare:

I am the Petitioner in this action. I have authored, read and know the contents of the foregoing Petition for a Federal Writ of Habeas Corpus and the facts stated therein are true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 3-2-08, at Folsom, California.

Respectfully submitted,



Jason Paul Voelker
California State Prison, Folsom
P.O. Box 950
Folsom, CA 95763
Prison ID.# V-62496

In propria persona

DECLARATION OF SERVICE BY UNITED STATES MAIL

I, Jason Paul Voelker, do hereby declare:

I am a citizen owing loyalty to and entitled to the protections of the United States of America. I am 26 years old; I am a party to the within action; my legal address is California State Prison, Folsom, P.O. Box 950, Represa, California 95673.

On 3-2-08, I served the within:

**PETITION FOR A FEDERAL WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
(28 U.S.C. section 2254)**

on the following interested persons in said action by delivering a true copy thereof enclosed in an envelope to prison staff addressed as follows:

CALIFORNIA ATTORNEY GENERAL'S OFFICE

ATTN: Jeremy Friedlander (State Bar No. 125138), Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

I am readily familiar with the prison's practice of collection and processing correspondence for legal mailing. It is normally deposited with the U.S. Postal Service within a "reasonable amount of time" in the ordinary course of business.

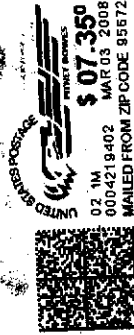
I declare under the penalty of perjury that the foregoing is true and correct.

Dated: 3-2-08



Jason Paul Voelker

VOELKER V62496
Folsom State Prison
PO Box 950 5 A62-38
Folsom CA 95671



U S DISTRICT COURT
NORTHERN DISTRICT
450 GOLDEN GATE AVE
SAN FRANCISCO CA 94102

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RICHARD W. VIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA